Supreme Court, U.S.
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CASE NO. 91-923

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 1991, TERM

****

GEARY DISTRIBUTING COMPANY, INC.,

Petitioner,

vs.

ALL BRAND IMPORTERS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THOMAS F. NEAL
Florida Bar No. 603368
COUNSEL OF RECORD
DRAGE, deBEAUBIEN, KNIGHT
& SIMMONS
Attorneys for Petitioner
120 South Orange Avenue
Post Office Box 87
Orlando, Florida 32802
(407) 422-2454

QUESTIONS PRESENTED

I. WHETHER THE POWERS GRANTED THE STATES UNDER THE TWENTY-FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION CAN BE ABROGATED BY A STATE CONSTITUTIONAL PROVISION.

II. WHETHER AN APPELLATE COURT HAS JURISDICTION TO DETERMINE AN ISSUE BRIEFED BY A PARTY, BUT NOT RAISED BY THAT PARTY IN ITS NOTICE OF APPEAL AND STATEMENT OF ISSUE PRESENTED ON APPEAL.

LIST OF ALL PARTIES TO THIS PROCEEDING

Geary Distributing Company, Inc., is a Florida Corporation, and is solely owned and operated by William and Patricia Geary of 2011 Rockledge Drive, Rockledge, Florida 32955. Geary Distributing Company, Inc., has no parent or subsidiary companies.

All Brand Importers, Inc., is a New York Corporation with its principal place of business located at 430 New Park Avenue, Post Office Box 4159, Hartford, Connecticut 06147-4159. All Brand Importers, Inc., is a wholly owned subsidiary of Heublein, Inc.

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REFERENCE LIST OF REPORTS AND OPINIONS

1. Geary Distributing Company, Inc. v. All Brand Importers, Inc., 931 F.2d 1431 (11th Cir. 1991).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eleventh Circuit filed its opinion in this case on May 22, 1991. (Appendix 8) On July 26, 1991, Petitioner's Motion For Rehearing was denied. (Appendix 9) This Court has jurisdiction to review the decision below, under title 28 of the United States Code.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. TWENTY-FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, (U.S. Const. amend. XXI)-

SECTION 1. The eighteenth article of Amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an Amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

2. ARTICLE I, SECTION 10 OF THE FLORIDA CONSTITUTION, (Art. I, Sec. 10, Fla. Const.)-

SECTION 10. Prohibited laws.- No bill of attainder, ex post facto law or law impairing the obligation of contracts shall by passed.

3. FLORIDA STATUTE 563.022, (Sec. 563.022, Fla. Stat. 1989)-

See Appendix 1 or full text.

4. FLORIDA STATUTE 725.01, (Sec. 725.01, Fla. Stat. (1988)-

725.01 PROMISE TO PAY ANOTHER'S DEBT, ETC.-

No action shall be brought whereby to charge any executor or administrator upon any special promise to answer or pay any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person or to charge any person upon any agreement made upon consideration of marriage, or upon any contract for the sale of lands, tenements or hereditaments, or of any uncertain interest in or concerning

them, or for any lease thereof for a period longer than 1 year, or upon any agreement that is not to be performed within the space of 1 year from the making thereof, or whereby to charge any health care provider upon any guarantee, warranty, or assurance as to the results of any medical, surgical, or diagnostic procedure performed by any physician licensed under chapter 458, osteopath licensed under chapter 459, chiropractor licensed under chapter 460, podiatrist licensed under chapter 461, or dentist licensed under chapter 466, unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized.

STATEMENT OF THE CASE

GEARY DISTRIBUTING COMPANY, INC., ("GEARY") brought suit in the State Court in and for Orange County, Florida alleging that ALL BRAND IMPORTERS, INC. ("ALL BRAND") unreasonably withheld its consent to the assignment of GEARY'S distributorship rights to a third party. ALL BRAND removed the case to the Federal Court in the Middle District of Florida, Orlando Division on the basis of diversity jurisdiction, 18 U.S.C. 1332. After partial summary judgment in favor of GEARY was entered and a non-jury trial was completed on the remaining issues, the United States District Court for the Middle District of Florida, case number 87-968 CIV-ORL-19, Robert R. Merhige, Jr., visiting Judge, held that Florida's beer distribution statute could be retroactively applied to the contract

and to the wholesaler. (Appendices 2 and 3) Thereafter, ALL BRAND appealed that decision to the United States Court of Appeals for the Eleventh Circuit, contending that the District Court erred by retroactively applying the beer distribution statute, Section 563.022, Florida Statutes (1987) to the contract at issue in this case. GEARY cross appealed contending that the District Court erred by failing to conduct an evidentiary hearing to determine the amount of attorneys' fees to be awarded in this case.

On July 21, 1989, ALL BRAND filed its Notice of Appeal and thereafter filed its Statement Of The Issue Presented On Appeal. (Appendix 4) Thereafter, on August 2, 1989, GEARY filed its Notice of Cross Appeal, and subsequently filed its Statement Of The Issue Presented On Cross Appeal.

(Appendix 5) Pursuant to Federal Rule of Appellate Procedure 28(h), on or about November 13, 1989, GEARY filed the first brief in this case. After an enlargement of time, ALL BRAND filed its Answer/Initial Brief on January 5, 1990, and its corrected Answer/Initial Brief on January 8, 1990.

In its Initial Brief, however, ALL BRAND argued a completely different issue than it raised in its Notice of Appeal and its Statement of the Issue Presented on Appeal. (Appendix 6) In its initial Brief, ALL BRAND argued that the District Court's retroactive application of Section 563.022 of the Florida Statutes unconstitutionally impaired ALL BRAND's pre-existing contract rights. The Brief goes into a lengthy analysis of Florida and Federal prohibitions against contract impairment, application of contract

impairment analysis to this case, substantial impairment, analysis of cases justifying retroactive application of a statute, and arguments regarding the unreasonable results of the retroactive application of the statute.

In its entire Initial Brief, there is not a single mention of the issue that ALL BRAND raised on appeal pursuant to its Notice of Appeal filed July 21, 1989, and its Statement of the Issue presented on Appeal filed on or about August 3, 1989. In its Statement of Issue Presented on Appeal, ALL BRAND stated:

> ...the single issue raised by its appeal of the Final Judgment entered by the District Court on June 21, 1989, is as follows:
>
> Whether the District Court erred in concluding as a matter of law that Section 563.022 of the Florida Statutes (Florida's Beer Distribution Statute) superseded Section 725.01 of the Florida Statutes (Florida's Statute of Frauds)

and governed the determination of this action?

ALL BRAND failed to brief the issue of whether the Florida Beer Statute superseded Florida's Statute of Frauds. Instead, ALL BRAND shifted gears and argued that the Florida Beer Statute is an unconstitutional impairment of ALL BRAND's pre-existing contract rights. GEARY filed a Motion To Dismiss For Lack Of Jurisdiction directed to ALL BRAND's initial brief, which was denied by the Eleventh Circuit without opinion. (Appendix 7)

The United States Court of Appeals for the Eleventh Circuit filed its opinion in this matter on May 22, 1991, holding that the retroactive application of the beer distribution statute to an existing alcoholic beverage distribution contract would be found by the Supreme Court of Florida to result in impairment of the contract significantly greater

than necessary, and therefore would violate the contract clause of the Florida Constitution. (Appendix 8). The Eleventh Circuit reasoned that the State of Florida's power to enact the beer distribution statute derived not from the Twenty-first Amendment to the United States Constitution, but from the State's inherent police power to regulate activity within its borders.

ARGUMENT

The decision of the Eleventh Circuit Court of Appeals, interpreting Florida's beer distribution statute, conflicts with this Court's rulings in New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) and City of Newport, Ky v. Iacobucci, 479 U.S. 92, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986). Additionally, the Eleventh Circuit's decision to deny GEARY's Motion To Dismiss For Lack Of Jurisdiction conflicts with Torres v. Oakland Scavenger Co., 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988).

QUESTION 1 - WHETHER THE POWERS GRANTED THE STATES BY THE TWENTY-FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION CAN BE ABROGATED BY A STATE CONSTITUTIONAL PROVISION.

This Court has long recognized that a state has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries. Ziffrin, Inc. v. Reeves, 308 U.S. 132, 60, S.Ct. 163, 84 L.Ed. 128, (1939); N.Y. State Liquor

Authority v. Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) and City of Newport, Ky v. Iacobucci, 479 U.S. 92, 107 S.Ct. 383, 93 L.Ed.2d. 334 (1986). The United States Court of Appeals for the Eleventh Circuit had previously followed the precedent set forth in the above cases. Geaneas v. Willets 911 F.2d. 579 (11th Cir. 1990) and Fillingim v. Boone, 835 F.2d. 1389 (11th Cir. 1988). The decision sought to be reviewed, however, conflicts with the above cited case law by holding that the authority for Florida's beer distribution statute is derived not from the Twenty-first Amendment to the United States Constitution, but from the state's inherent police powers. Additionally, the decision of the Eleventh Circuit in this case prohibits the State of Florida from exercising its full power under the Twenty-first Amendment, by interpreting the contract clause of the Florida Constitution as controlling.

The question presented in Bellanca concerned the power of the state of New York to prohibit topless dancing in an establishment licensed by the state to serve liquor. Bellanca, 452 U.S. at 714, 101 S.Ct. at 2600. In 1977, the State of New York amended its Alcoholic Beverage Control Law to prohibit nude dancing in establishments licensed by the state to sell liquor for on-premises consumption. Id. at 52 U.S. 714, 101 S.Ct. at 2600.

Respondents in that case, who were owners of nightclubs, bars and restaurants which had for a number of years offered topless dancing, brought a declaratory judgment action in state court alleging that the subject statute violated the First Amendment of the United States Constitution in so far as it prohibited all topless dancing in all licensed premises. Id. 452 U.S. at 715, 101 S.Ct. at 2600. The New York Supreme Court declared the statute un-

constitutional and the New York Court of Appeals affirmed by a divided vote. Id. 452 U.S. at 715, 101 S.Ct. 2600. This Court reversed the decision of the New York Court of Appeals holding that a state has the absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries. Id. 452 U.S. at 715, 101 S.Ct. at 2600. The Court went on to hold that "it is equally well established that a state has broad power under the Twenty-first Amendment to regulate the times, places and circumstances under which liquor may be sold". Id. 452 U.S. at 715, 101 S.Ct. 2600. The Court, after reviewing its standard set forth in California v. LaRue, 409 U.S. 109, 923 S.Ct. 390, 34 L.Ed.2d 390 (1972) and Doran v. Salem Inn, Inc. 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), found that the New York statute at issue was not unconstitutional. Id. 452 U.S. at 717, 101 S.Ct. at 2601. Referring to the New York

legislature's enactment of the statute at issue, the Court said that the legislature had done precisely what this Court has said a state may do:

> Pursuant to its power to regulate the sale of liquor within its boundaries, it has banned topless dancing in establishments granted a license to serve liquor. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor in premises where topless dancing occurs. Id. 452 U.S. at 717, 101 S.Ct. at 2601.

In the City of Newport, Ky v. Iacobucci, this Court once again had before it a challenge to an ordinance prohibiting nude or nearly nude dancing in establishments licensed to sell liquor for consumption on the premises. Iacobucci, 479 U.S. at 92, 93, 107 S.Ct. at 383, 384. The Respondents in that case challenged the ordinance in federal court contending that the ordinance deprived them of their rights under the First and Fourteenth Amendments. Id. 479 U.S. at 93, 107 S.Ct. at 384. The district court ruled

that the ordinance was constitutional, stating that it was "squarely within the doctrine of Bellanca... and must be upheld on that basis." Id. 479 U.S. at 93, 94, 107 S.Ct. at 384. A divided panel of the United States Court of Appeals for the Sixth Circuit reversed that judgment finding that the decision in Bellanca was inapplicable. Id. 479 U.S. at 94, 107 S.Ct. at 384. The dissenting judge argued that the majority read Bellanca too narrowly and contended that the City of NewPort was not restricted solely to the exercise of the police power to regulate the liquor industry. Id. 479 U.S. at 94, 107 S.Ct. at 385. (emphasis added)

This Court agreed with the dissents' conclusion that the case was controlled by Bellanca and reversed. Id. 479 U.S. at 94, 107 S.Ct. at 385. The Court, citing LaRue concluded that the broad powers of the state to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any

First Amendment interest in nude dancing and that a state could therefore ban such dancing as part of its liquor license program. Id. 479 U.S. 95, 107 S.Ct. 385.

The decisions in Bellanca and Iacobucci clearly indicate that a state has the absolute power under the Twenty-first Amendment to totally ban the sale of liquor within its boundaries and that the Twenty-first Amendment has given broad powers to the states to regulate intoxicating liquors. Further, La Rue and Bellanca hold that there is an "added presumption in favor of the validity of the state regulation" conferred by the Twenty-first Amendment. LaRue, 409 U.S. at 118, 93 S.Ct. at 397 and Bellanca 452 U.S. at 718, 101 S.Ct. at 2602.

In the opinion filed on May 22, 1991, the United States Court of Appeals for the Eleventh Circuit held that Florida's authority for its beer distributorship statute comes not from the Twenty-first

Amendment to the United States Constitution, but rather from Florida's inherent police power to regulate commercial activity within its borders. Geary Distributing v. All Brand Importers, 931 F.2d 1431 (11th Cir. 1991). This holding is directly in conflict with the decision of Fillingim v. Boone, 835 F.2d 1389 (11th Cir. 1988).

In Fillingim, the co-manager of a nightclub who was prosecuted and convicted for violating a Leon County, Florida ordinance regarding adult entertainment brought a habeas corpus action challenging the constitutionality of the ordinance. Id. at 1391. The United States District Court for the Northern District of Florida adopted the report of the magistrate, finding the ordinance constitutional and upholding the Petitioner's conviction. Id. at 1392. On appeal, the Eleventh Circuit Court of Appeals affirmed the district court on the basis of the magistrate's opinion, which was adopted

by the district court. Id. at 1392.

Contained in the opinion upon which the court affirmed in Fillingim is the following:

> In reviewing the petition for certiorari on the direct appeal of his conviction, Florida's First District Court of Appeal examined the county's powers in terms of the Twenty-first Amendment and found the county's adoption of the ordinance to be constitutionally proper: The Twenty-first Amendment to the United States Constitution provides the source of the state's police power of regulation over the distribution or use of intoxicating beverages.
> Id. at 1394 (emphasis added).

The holding in Fillingim is directly and unequivocally at odds with the holding in the case before this Court. GEARY respectfully submits that Florida's authority for its beer distribution statute does come from the Twenty-first Amendment to the United States Constitution which confers upon the states the absolute power to totally prohibit the sale of liquor within their boundaries. See Ziffrin, 308 U.S. 132, 60 S.Ct. 163; Bellanca, 452 U.S. 714, 101 S.Ct. 2599; and

Iacobucci, 479 U.S. 92, 107 S.Ct. 383.

Pursuant to the holdings in Ziffrin, Bellanca and Iacobucci, the State of Florida has the absolute power to prohibit the sale of intoxicating beverages within its borders. If the State of Florida has the power to totally ban the sale of intoxicating beverages within its border, then it logically follows that the State of Florida has the broad power to regulate the times, places and circumstances under which liquor may be sold. Bellanca, 452 U.S. 715, 101 S.Ct. 2600.

The United States Court of Appeals for the Eleventh Circuit, in its opinion of May 22, 1991, has emasculated the ability of the State of Florida to prohibit the sale of liquor within its boundaries. If that court's decision, based upon an impairment analysis under the Florida Constitution's contract clause, is not reversed or overturned, the State of Florida can never prohibit the sale

of intoxicating or alcoholic beverages pursuant to the Twenty-first Amendment, because it will not be able to enact any legislation that will in any way affect any contract already in existence regarding the distribution of alcoholic beverages. It must logically follow that the state's power pursuant to the Twenty-first Amendment to totally ban the sale of alcoholic beverages also encompasses the lesser power to regulate those same beverages. As set forth in Ziffrin:

> Having the power absolutely to prohibit manufacture, sale, transportation or possession of intoxicants, it was permissible for Kentucky to permit these things only under definitely prescribed conditions. Former opinions here make an affirmative answer imperative. The greater power includes the lesser. Ziffrin, 308 U.S. at 138, 60 S.Ct. at 167.

Further, the opinion in the case of Bellanca v. N.Y. State Liquor Authority, 54 N.Y. 2d 228, 429 N.E.2d 765, 445 N.Y.S.2d 87 (1981), cert. denied, 456 U.S. 1006, 102

S.Ct. 2296, 73 L.Ed.2d 1300 (1982), wherein the New York Court of Appeals invalidated the statute once again on other grounds, has been unequivocally renounced by the Supreme Court of Florida in City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985). For that reason, it is submitted by GEARY that the Supreme Court of Florida would not rule the same as the United States Court of Appeals for the Eleventh Circuit has in the instant case.

In analyzing the cases cited, it is clear that the Twenty-first Amendment has received very different treatment depending on whether it was balanced against a First Amendment challenge in an adult entertainment context, or whether it was pitted against other provisions of the United States Constitution. As stated much more eloquently in Justice Stevens' dissent in Iacobucci, than in this Petition for Writ of Certiorari:

> In recent years, however, the Court has completely distorted the

Twenty-first Amendment. It now has a barely discernible effect in Commerce Clause cases, see, e.g. Brown-Forman Distillers Corp v. New York State Liquor Authority, 476 U.S. 573, S.Ct. 2080, 90 L.Ed.2d 552 (1986); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 279, 104 S.Ct. 3049, 3060, 82 L.Ed.2d 200 (1984), but under Bellanca and the Court's decision today, it may be dispositive in First Amendment cases. This paradox cannot be overstated: reading Bellanca one would have thought that the Court was prepared to recognize some bite in the Twenty-first Amendment. The intervening decisions in Brown-Forman and Bacchus demonstrate, however, that it is toothless except when freedom of speech is involved.

The Court fails to explain how its treatment of freedom of speech in New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S. Ct. 2599, 69 L.Ed.2d 357 (1981), and this case is consistent with its discussion of the Twenty-first Amendment's lack of effect on the Bill of Rights in Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). Nor does the Court mention that in a post-Bellanca decision it unequivocally rejected the notion that a State may "exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment." Larkin v. Grendel's Den, Inc. 459 U.S. 116, 122, n. 5, 103 S.Ct. 505, 509, n. 5, 74 L.Ed.2d 297 (1982). There was

absolutely no discussion of any added presumption of validity in Larkin.

These vastly different effects that have been attributed to the Twenty-first Amendment can surely not be explained as reflecting a difference in the value that is placed on free speech, from that which is placed on the Equal Protection Clause, or the Establishment Clause. In Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982), the Court firmly declared that there is no "principled basis on which to create a hierarchy of constitutional values." Id. at 484,102 S.Ct. at 765. In so stating, the Court declined to afford the Establishment Clause any special respect. Yet today, the Court not only appears to reject the proposition that all constitutional values are equivalent, but actually concludes that some of the other values protected by the First Amendment are at the low end of the sliding scale. Iacobucci, 479 U.S. at 98, 99, 107 S.Ct. at 387 (full text of f.n. number 1 included) (emphasis added).

It is suggested to this Court that the United States Court of Appeals for the Eleventh Circuit has erred in its May 22, 1991, decision in this case, and that it

conflicts with the above-cited case law. As set forth above, the holding that the Twenty-first Amendment does not apply in this case totally emasculates the State of Florida's power to regulate intoxicating liquors within its borders. It is further suggested that there is a conflict between the Eleventh Circuit's decision in this case and the decisions of this Court which relate to the different treatment afforded to the Twenty-first Amendment.

QUESTION 2 - WHETHER AN APPELLATE COURT HAS JURISDICTION TO DETERMINE AN ISSUE BRIEFED BY A PARTY, BUT NOT RAISED BY THAT PARTY IN ITS NOTICE OF APPEAL AND STATEMENT OF ISSUE PRESENTED ON APPEAL.

Generally, federal courts are obliged to undertake jurisdictional inquiry whenever it appears that, in fact, no jurisdiction exists. Osterneck v. E.P. Barwick Industries, Inc., 825 F.2d 1521 (11th Cir. 1987). Based on the following arguments, the United States Court of Appeals for the Eleventh Circuit should have refused

jurisdiction over the issue of whether Section 563.022 of the Florida Statutes constituted an unconstitutional impairment of contracts.

In C.A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049 (5th Cir. 1981) cert. denied, 454 U.S. 1125, 102 S.Ct. 974, 71 L.Ed.2d 112 (1981), the Fifth Circuit held that where an appellant notices the appeal of a specified judgment only, or a part thereof, the court of appeals has no jurisdiction to review other judgments or issues which are not expressly referred to, and which are not impliedly intended for appeal. In that case the appellant filed a notice of appeal that expressly referred to a portion of the lower court's order denying the appellant's motion for a new trial. Id. at 1055. Thereafter, in its brief, the appellant argued that the trial court had erred by failing to award attorneys' fees. Id. at 1055-56. The court held that it

lacked jurisdiction to review the question of the appellant's right to attorneys' fees because in its Notice of Appeal the appellant had specifically referred to the portion of the trial court's order denying the appellant's motion for a new trial. The court went on to state that the express mention in the Notice of Appeal of one part of the order negated any inference of intent to appeal from the order as a whole. Id. at 1056.

In this case, ALL BRAND negated any inference of intent to appeal the constitutionality of Section 563.022 of the Florida Statutes by its express statement that the single issue raised by its appeal was whether the district court erred in concluding as a matter of law that Section 563.022 superseded Section 725.01 of the Florida Statutes.

In NAACP v. City of Evergreen, Alabama, 693 F.2d 1367 (11th Cir. 1982) the court held

that where the NAACP's intent to appeal the amount of attorneys' fees awarded was not even vaguely apparent until it filed its opening brief in the court of appeals, and since the NAACP's argument that attorneys' fees were insufficient was entirely different from the issue of whether it was entitled to such fees at all, the issue as to the amount of attorneys' fees was not properly raised. Citing C.A. May Marine the court stated:

> This Court, however, has only pardoned insufficient notice of appeal when an intent to appeal is truly apparent or where claims or issues are inextricably entwined with issues that have been properly raised. (citations omitted). We can not say that the NAACP's intent to appeal the amount of the attorneys' fees award was even vaguely apparent until the NAACP filed its opening brief on September 18. Moreover, the NAACP's argument that attorneys' fees were insufficient is entirely different from the issue of whether it was entitled to attorneys' fees at all. We therefore, dismiss this issue as not properly raised.
>
> NAACP v. City of Evergreen, Alabama at 1371.

ALL BRAND's intent to appeal the constitutionality of Section 563.022 of the

Florida Statutes was not apparent until ALL BRAND filed its opening brief on January 5, 1990. ALL BRAND's argument that Section 563.022 of the Florida Statutes is unconstitutional is entirely different from the issue of whether Section 563.022 superseded Section 725.01 of the Florida Statutes. Since there was not intent to appeal the constitutionality of the statute in question, the issue was not properly raised and the United States Court of Appeals for the Eleventh Circuit should have dismissed ALL BRAND's Answer Brief for lack of jurisdiction.

The Seventh Circuit has also followed the rationale of C.A. May Marine. In Brandt v. Schal Associates, Inc. 854 F.2d 948 (7th Cir. 1988), the court was faced with the identical issue that was before the appellate court in this case. In Brandt, the appellant filed a statement of issues to be raised on appeal. Id. at 951. The statement set forth

only one issue to be appealed. Id. at 951. Thereafter, in his brief, the appellant attempted to raise a different issue than the one that he presented in his statement of issues to be raised on appeal. Id. at 954.

In holding that it had no jurisdiction to entertain the appellant's contention, the Seventh Circuit held:

> Both the notice of appeal and statement of issues, while detailing the other matters that Mr. Brandt (the appellant) planned to raise on appeal, did not mention any intention to appeal from the September 25 order of voluntary dismissal. By affirmatively stating that he appealed from only one part of the September 25 order, Mr. Brandt excluded the other part from his appeal. Id. at 954.

In this case, ALL BRAND had done the exact same thing-- designated one issue in its Statement of Issue Presented on Appeal and argued a different issue in its brief. ALL BRAND, by affirmatively stating that it only appealed a certain single issue should have been precluded from arguing a different issue on appeal.

This Court has ruled affirmatively on enforcing strict compliance with the jurisdictional requirements of Rules 3 and 4 of the Federal Rules of Appellate Procedure. In Torres v. Oakland Scavenger Co., 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), this Court held that although a court may construe the rules liberally in determining whether they have been complied with, it may not waive the jurisdictional requirement of Rules 3 and 4, even for "good cause shown" under Rule 2, if it finds that they have not been met.

In the Torres case, this Court affirmed the judgment of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit had held that it did not have jurisdiction over an appeal of a litigant who was not specifically named in the notice of appeal due to clerical error on part of the secretary employed by the litigant's attorney. Id. at 2405. This Court in Torres

also held that a litigant's failure to clear a jurisdictional hurdle can never be "harmless" or waived by the Court. Id. at 2409, footnote 3.

Since ALL BRAND obviously intended to only appeal the single issue set forth in its Statement of Issue Presented for Appeal, it waived its right to appeal a different issue. Further, the appellate court lacked jurisdiction to entertain any issue not properly preserved for appeal.

The United States Court of Appeal for the Eleventh Circuit lacked jurisdiction to entertain ALL BRAND's Initial Brief regarding the constitutionality of Section 563.022 of the Florida Statutes. ALL BRAND's Statement of the Issue Presented on Appeal expressly referred to the issue of whether Section 563.022 superseded Section 725.01 of the Florida Statutes. ALL BRAND intentionally elected not to raise the issue of the constitutionality of Section 563.022. ALL

BRAND specifically limited its appeal to a single issue. ALL BRAND should, therefore, have been precluded from raising a different issue on appeal.

CONCLUSION

Based on the case law interpreting the effect on the states of the Twenty-first Amendment to the United States Constitution, and the lack of jurisdiction to entertain certain arguments on appeal, the decision in this case of the Eleventh Circuit Court of Appeals should be reversed. If a state has the power to totally ban the sale of alcohol within its borders, it is illogical for a court to determine that legislation of a lesser extreme is not allowed based on an impairment of contracts analysis. Clearly, a total ban on the sale of alcohol within a state would impair numerous contracts. Yet nowhere in the case law under the Twenty-first Amendment is there an exception to that power based on an impairment of contracts

analysis. Furthermore, the Eleventh Circuit Court of Appeals should have only decided the sole issue presented for appeal. It lacked jurisdiction to entertain arguments on the issue of contract impairment as it was never raised in the Notice of Appeal, or in the Statement of Issue Presented for Appeal.

Respectfully submitted,

THOMAS F. NEAL
Florida Bar No. 603368
ATTORNEY OF RECORD
DRAGE, deBEAUBIEN,
KNIGHT & SIMMONS
120 South Orange Avenue
Post Office Box 87
Orlando, Florida 32802
(407) 422-2454
Attorneys for GEARY

APPENDIX 1

RELATIONS BETWEEN BEER DISTRIBUTORS AND MANUFACTURERS.-

(1) LEGISLATIVE FINDINGS AND INTENT.-

(a) Regulation of business relations between beer distributors and manufacturers is necessary and appropriate in the public interest.

(b) This section is enacted pursuant to authority of the state under the provisions of the Twenty-First Amendment to the United States Constitution to promote the public's interest in fair, efficient, and competitive distribution of malt beverage products by regulation and encouragement of manufacturers and distributors to conduct their business relations toward these ends by:

1. Assuring that the beer distributor is free to manage its business enterprise, including the

distributor's right to independently establish its selling prices;

2. Assuring the manufacturer and the public of service from a distributor who will devote reasonable efforts and resources to sales and distribution of the manufacturer's products, which distributor has been granted the right to sell and distribute and to maintain a satisfactory sales level; and

3. Establishing and maintaining an orderly system of distribution of beer to the public.

(c) This section shall govern all relations between manufacturers and their distributors to the full extent consistent with the constitutions and laws of this state and the United States.

(d) In order to promote the intention and policies announced herein, the provisions of this section shall be liberally construed.

(2) DEFINITIONS.- In construing this section, unless the context otherwise requires, the word, phrase, or term:

(a) "Designated Member" means the spouse, child, grandchild, parent, brother, or sister of a deceased individual who owned an interest in a distributor, who is entitled to inherit such ownership interest under the laws of intestate succession of this state. With respect to an incapacitated individual owning an ownership interest in a distributor, the term means the person appointed by a court as the conservator of such individual's property. The term also includes the appointed and qualified personal representative and the testamentary trustee of a deceased individual owning an ownership interest in a distributor.

(b) "Distributor" or "Wholesaler" means any person, firm, association,

corporation, or company which is a distributor licensed to sell and distribute beer at wholesale to persons who are licensed to sell beer.

(c) "Franchise" means a contract or agreement, either expressed or implied, whether oral or written, for a definite or indefinite period of time in which a manufacturer grants to a beer distributor the right to purchase, resell, and distribute any brand or brands offered by the manufacturer.

(d) "Franchisee" means a beer distributor to whom a franchise is offered or granted.

(e) "Franchisor" means a beer manufacturer who grants a franchise to a beer distributor.

(f) "Fraud" includes actual fraud or constructive fraud as normally defined, in addition to the following:

1. A misrepresentation in any manner, whether intentionally false or

arising from gross negligence, of a material fact.

2. A promise or representation not made honestly and in good faith.

3. An intentional failure to disclose a material fact.

4. Any artifice employed to deceive another.

(g) "Good faith" means honesty in fact in the conduct or transaction concerned as defined and interpreted under s. 671.201(19).

(h) "Manufacturer" means any person who manufacturers or imports beer for distribution to distributors licensed in Florida.

(i) "Person" means a natural person, corporation, association, partnership, trust, or other business entity and, in case of a business entity, shall include any other entity in which it has a majority interest or it effectively controls, as well as the

individual officers, directors, and other persons in active control of the activities of each such entity. The term also includes heirs, assigns, personal representatives, and guardians.

(j) "Reasonable qualifications" means the standard of the reasonable criteria established and consistently used by the respective manufacturer for Florida distributors that entered into, continued, or renewed an agreement with the manufacturer during a period of 24 months prior to the proposed transfer of the distributor's business, or for Florida distributors that have changed managers or designated managers during a period of 24 months prior to the proposed change in manager or successor manager of the distributor's business.

(k) "Retaliatory action" includes, but is not limited to, the refusal to continue an agreement or a material reduction in the quality of service or

quantity of products available to a distributor under an agreement which refusal or reduction is not made in good faith.

(l) "Sale" includes the issuance, transfer, agreement for transfer, exchange, pledge, hypothecation, or mortgage in any manner or form, whether by transfer in trust or otherwise, of beer or of any franchise related thereto for a consideration and any option, subscription, or other contract, or solicitation, looking to a sale, or offer or attempt to sell in any form, whether in oral or written form, for a consideration.

(m) "Transfer of a distributor's business" means the voluntary sale, assignment, or other transfer of the business or control of the business of the distributor, including the sale or other transfer of stock or assets by merger, consolidation, or dissolution.

(3) APPLICATION. - Any person who engages directly or indirectly in purposeful agreements or contracts in connection with the sale of beer to beer distributors within this state shall be subject to the provisions of this section and shall be subject to the jurisdiction of the courts of this state for violations of this section in accordance with the provisions of the laws of this state.

(4) UNLAWFUL ACTS AND PRACTICES. - Unfair methods of competition and unfair or deceptive acts or practices in the conduct of the manufacturing, importing, distribution, sale, wholesaling, and franchising of beer, as defined in subsection (5), are declared to be unlawful. Any person who violates any provision of this section shall not be subject to the criminal penalties set forth in the Beverage Law on account of such violation.

(5) UNFAIR AND PROHIBITED ACTS. -

(a) It shall be deemed a violation of subsection (4) for any manufacturer or distributor to engage in any action which is in bad faith or unconscionable and which causes damage in terms of law or equity to any of the parties or to the public.

(b) It shall be deemed a violation of subsection (4) for a manufacturer or officer, or other representative thereof:

1. To coerce or compel, or attempt to coerce or compel, any beer distributor to order or accept delivery of any beer or any other commodity or commodities which such beer distributor has not voluntarily ordered.

2. To refuse to deliver in reasonable quantities and within a reasonable time after receipt of the distributor's order to any distributor having a franchise or contractual

agreement for the distribution and sale of beer sold by such manufacturer, beer covered by such franchise or contract. However, the failure to deliver any such beer shall not be considered a violation of this section if such failure is due to prudent and reasonable restriction on extension of credit by the manufacturer to the distributor, an act of God, work stoppage or delay due to a strike or labor difficulty, a bona fide shortage of materials, freight embargo, or their cause over which the manufacturer, or any agent thereof, shall have no control whatsoever.

3. To coerce or compel, or attempt to coerce or compel, a beer distributor to enter into any agreement, whether written or oral, supplementary to an existing franchise with such manufacturer or officer, agent, or other representative thereof, or to do any other act prejudicial to such

distributor, by threatening to cancel any franchise or any contractual agreement existing between such manufacturer and such distributor. However, notice in good faith to a beer distributor of such distributor's violation or breach of any terms or provisions of such franchise or contractual agreement shall not constitute a violation of this section if such notice is in writing, is mailed by registered or certified mail to such distributor at his current business address, and contains the specific facts as to the distributor's violation or breach od such franchise or contractual agreement.

4. To terminate, cancel, fail to renew, or refuse to continue the franchise or selling agreement of any such distributor without good cause as defined in subsections (7) and (10). The nonrenewal of a franchise or selling

agreement without good cause shall constitute an unfair termination or cancellation regardless of the specified time period of such franchise or selling agreement.

5. To willfully discriminate, either directly or indirectly, in price offered to franchisees where the effect of such discrimination is likely to substantially lessen competition.

6. To prevent or attempt to prevent, by contract or otherwise, any beer distributor from changing the capital structure of his distributorship or the means by or through which he finances the operation of his distributorship, provided that the distributor at all times meets capital standards which are reasonable in light of generally accepted capital standards within the manufacturer's beer distribution system. Nothing in this subparagraph diminishes the right of a

manufacturer to prohibit public ownership of its franchises.

7. To prevent or attempt to prevent, by contract or otherwise, any beer distributor or any officer, member, partner, or stockholder of any beer distributor from selling or transferring any part of the interest of any of them to any other person or persons or party or parties. However, no distributor, officer, partner, or stockholder shall have the right to sell, transfer, or assign the franchise or power of management or control thereunder without the written consent of the manufacturer, distributor, or wholesaler, except that such consent shall not be unreasonably withheld.

a. No manufacturer shall unreasonably withhold or delay its approval of any assignment, sale, or transfer of the stock of a distributor or of all or any portion of a

distributor's assets, a distributor's voting stock , the voting stock of any parent corporation, or the beneficial ownership or control of any other entity owning or controlling a distributor, including the distributor's rights and obligations under the terms of an agreement, whenever the person or persons to be substituted meet reasonable qualifications. Upon the death of one of the partners of a partnership operating the business of a distributor, no manufacturer shall deny the surviving partner or partners of such partnership the right to become a successor-in-interest to the agreement between the manufacturer and such partnership, provided that the survivor has been active in the management of the partnership and is otherwise capable of carrying on the business of the partnership, and provided further that such right is consistent with the rights

and desires of the heirs or devises of the deceased partner.

b. Notwithstanding the provisions of subparagraph a., upon the death of a distributor, no manufacturer shall deny approval for any transfer of ownership to a designated member of the family of an owner of a distributor provided, however, that any subsequent transfer of such ownership by such designated member shall thereafter be subject to the provisions of subparagraph a.

8. To obtain money, goods, services, anything of value, or any other benefit from any person in exchange for having coerced or compelled a beer distributor to do business with such other person.

9. To require a beer distributor to assent to a release, assignment, novation, waiver, or estoppel which would relieve any person from liability imposed by this section.

10. TO restrict or inhibit, directly or indirectly, the right of free association among manufacturers or distributors of beer for any lawful purpose.

11. To fix or maintain the price at which a distributor may resell beer.

12. To coerce or attempt to coerce any distributor to accept delivery of any beer or other commodity ordered by a distributor if the order was properly canceled by the distributor.

13. To change a distributor's quota of a brand or brands if the change is not made in good faith.

14. To require a distributor, by any means, to participate in or contribute to any local or national advertising fund controlled directly or indirectly by a manufacturer.

15. To take any retaliatory action against a distributor that files a complaint regarding an alleged violation

by the manufacturer of state or federal law or an administrative rule.

16. To require or prohibit, without good cause provided in writing, any change in the manager or successor manager of any distributor who has been approved by the manufacturer as of June 4, 1987. Should a distributor change an approved manager or successor manager, a manufacturer shall not require or prohibit the change unless the person fails to meet the reasonable written standards for Florida distributors of the manufacturer which standards have been provided to the distributor.

(6) DISTRIBUTOR'S REGULATION, CANCELLATION, TERMINATION, FAILURE TO RENEW, OR REFUSAL TO CONTINUE. - Notwithstanding any agreement and except as otherwise provided for in this section, a manufacturer shall not cause a distributor to resign from an agreement, or cancel, terminate, fail to

renew, or refuse to continue under an agreement unless the manufacturer has complied with all of the following:

(a) Has satisfied the applicable notice requirements of subsection (9).

(b) Has acted in good faith.

(c) Has good cause for the cancellation, termination, nonrenewal, discontinuance, or forced resignation.

(7) GOOD CAUSE. - Notwithstanding any agreement, good cause shall exist for the purposes of a termination, cancellation, nonrenewal, or discontinuance under paragraph (6)(c) when all of the following occur:

(a) There is a failure by the distributor to comply with a provision of the agreement which is both reasonable and of material significance to the business relationship between the distributor and the manufacturer.

(b) The manufacturer first acquired knowledge of the failure

described in paragraph (a) not more than 18 months before the date notification was given pursuant to subsection (6).

(c) The distributor was given written notice by the manufacturer of failure to comply with the agreement.

(d) The distributor was afforded a reasonable opportunity to assert good faith efforts to comply with the agreement within the time limits provided for in paragraph (e).

(e) The distributor has been afforded 30 days in which to submit a plan of corrective action to comply with the agreement and an additional 90 days to cure such noncompliance in accordance with the plan or to sell his distributorship consistent with the provisions of this section.

(8) BURDEN OF PROOF. - For each termination, cancellation, nonrenewal, or discontinuance, the manufacturer shall have the burden of showing that it

has acted in good faith, that the notice requirements under this section have been complied with, and that there was good cause for the termination, cancellation, nonrenewal or discontinuance.

(9) NOTICE. - Notwithstanding any agreement and except as otherwise provided in this section, the manufacturer shall furnish written notice of the termination, cancellation, nonrenewal, or discontinuance of an agreement to the distributor not less than 90 days before the effective date of the termination, cancellation, nonrenewal, or discontinuance; in no event shall the contractual term of any such franchise or selling agreement expires without the written consent of the beer distributor involved prior to the expiration of at least 90 days following such written notice. The notice shall be by certified mail and

shall contain all of the following:

(a) A statement of intention to terminate, cancel, not renew, or discontinue the agreement.

(b) A statement of the reason for the termination, cancellation, nonrenewal, or discontinuance.

(c) The date on which the termination, cancellation, nonrenewal, or discontinuance takes effect.

(10) CONDITIONS AND NOTICE REQUIRED. - Notwithstanding subsections (6) and (9), a manufacturer may terminate, cancel, fail to renew, or discontinue an agreement for good cause after not less than 15 days' written notice given in the manner and containing the information required by subsection (9), if any of the following occur:

(a) Insolvency of the distributor, the filing of any petition by or against the distributor under any bankruptcy or

receivership law, or the dissolution or liquidation of the wholesaler which materially affects the distributor's ability to remain in business.

(b) Revocation of the distributor's license by the division or by the Federal Bureau of Alcohol, Tobacco and Firearms whereby the distributor cannot distribute beer for more than 60 days.

(c) The distributor, or a partner or an individual who owns 10 percent or more of the partnership or stock of a corporate distributor, has been convicted of a felony under the United States Code or the laws of any state which reasonably may adversely affect the good will or interest of the distributor or manufacturer. However, an existing stockholder or stockholders, partner or partners, a designated member or members, or the distributor itself, if incorporated, shall have, subject to

the provisions of this section, the right to purchase the partnership interest or the stock of the offending partner or stockholder, and if the sale is completed within 15 days of the conviction of the offending partner or stockholder, the right of termination, cancellation, nonrenewal, or discontinuance of the distributorship agreement shall not apply.

(d) There was fraudulent conduct on the part of the distributor relating to a material matter in dealings with the manufacturer or its products.

(e) The principal of the distributor intentionally and willfully sells the manufacturer's products to a retailer or retailers located outside a distributor's territory, but only if the manufacturer has assigned exclusive territories to its distributors in Florida.

(f) The distributor fails to pay

for the manufacturer's products ordered and delivered in accordance with terms established with the manufacturer and has continued to fail to make payment within 15 business days after receipt of notice of the delinquency and demand for immediate payment.

(g) The distributor sells, transfers, or assigns the franchise or control thereunder without the written consent of the manufacturer.

(11) DISCONTINUANCE OF PRODUCTION OR DISTRIBUTION. - Notwithstanding subsections (6), (9), and (10), a manufacturer may terminate, cancel, not renew, or discontinue an agreement upon not less than 30 days' prior written notice if the supplier discontinues production or discontinues distribution throughout this state of all the brands sold by the manufacturer to the distributor. Nothing in this section shall prohibit a manufacturer, upon not

less than 30 days' notice, to completely discontinue the distribution throughout this state of any particular brand or package of beer. This subsection does not prohibit a manufacturer from conducting test marketing of a new brand of beer or from conducting the test marketing of a brand of beer which is not currently being sold in this state, provided that the manufacturer has notified the division in writing of its plans to test market. The notice shall describe the market area in which the test shall be conducted, the name or names of the distributor or distributors who will be selling the beer, the name or names of the brand of beer being tested, and the period of time during which the testing will take place. A market testing period shall not exceed 18 months.

(12) REASONABLE EFFORT REQUIRED. - The distributor shall devote such

efforts and resources, as required in the agreement between the distributor and the manufacturer, to sales and distribution of all the manufacturer's products which the distributor has been granted the right and has agreed to sell and distribute so long as such requirements are reasonable. In the absence of such an agreement, the distributor shall devote reasonable efforts and resources.

(13) WAIVER PROHIBITED. - A distributor shall not waive any of the rights granted in any provision of this section. Nothing in this section shall be construed to limit or prohibit good faith dispute settlements voluntarily entered into by the parties.

(14) MANUFACTURER; PROHIBITED INTERESTS. -

(a) This subsection applied to:

1. A manufacturer;

2. Any officer, director, agent,

or employee of a manufacturer; or

3. An affiliate of any manufacturer, regardless of whether the affiliation is corporate or by management, direction or control.

(b) Except as provided in paragraph (c), no entity or person specified in paragraph (a) may have an interest in the license, business, assets, or corporate stock of a licensed distributor nor shall such entity sell directly to any vendor in this state other than to vendors who are licensed pursuant to s. 561.221(2).

(c) Any entity described in paragraph (a) may financially assist a proposed distributor in acquiring ownership of the distributorship through participation in limited partnership arrangement in which the entity described in paragraph (a) is a limited partner and the proposed distributor seeking to acquire ownership of the

distributorship is the general partner. Such limited partnership arrangements may exist for no longer than 8 years from their creation and shall not be extended or renewed by means of a transfer of full ownership to an entity described in paragraph (a) followed by the creation of a new limited partnership or by any other means. In any such arrangement for financial assistance, the federal basic permit and distributor's license issued by the division shall be issued in the name of the distributor and not in the name of an entity described in paragraph (a). If, after the creation of a limited partnership pursuant to this paragraph, an entity described in paragraph (a) acquires title to the distributorship which was the subject of the limited partnership, the entity described in paragraph (a) shall diverse itself of the distributorship within 180 days, and

the distributorship shall be ineligible for limited partnership financing for 20 years thereafter. No entity described in paragraph (a) shall enter into a limited partnership arrangement with a licensed distributor whose distributorship existed and was operated prior to the creation of such limited partnership arrangement.

(d) Nothing in the Beverage Law shall be construed to prohibit a manufacturer from shipping products to or between its breweries without a distributor's license.

(e) Notwithstanding the provisions of paragraph (b) any entity named in paragraph (a) may have an interest in the license, business, assets, or corporate stock of a licensed distributor for a maximum of 180 consecutive days as the result of a judgment of foreclosure against the distributor or for 180 consecutive days

after acquiring title pursuant to the written request of the licensed distributor. Under either of these circumstances, manufacturer ownership of an interest in the license, business, assets, or corporate stock of a licensed distributor shall only be for 180 days and only for the purpose of facilitating an orderly transfer of the distributorship to an owner not affiliated with a manufacturer.

(f) Notwithstanding the provisions of paragraph (b) any entity named in paragraph (a) may have a security interest in the inventory or property of its licensed distributors to secure payment for said inventory or other loans for other purposes.

(15) AGREEMENTS SUBJECT TO SECTION. - The provisions of this section shall apply to all written or oral agreements between a manufacturer and beer distributor in existence on

June 4, 1987, as well as agreements entered into or renewed after June 4, 1987.

(16) AGREEMENTS BINDING ON SUCCESSOR. -A successor to a manufacturer that continues in business as a manufacturer shall be bond by all terms and conditions of each agreement of the manufacturer in effect on the date of succession.

(17) REASONABLE COMPENSATION. - Upon termination:

(a) Any manufacturer which, without good cause cancels, terminates, or fails to renew any agreement or lawfully denies approval of, or unreasonably withholds consent to, any assignment, transfer, or sale of a distributor's business assets or voting stock or other equity securities, shall pay such distributor with whom it has a written contract reasonable compensation for the diminished value of the

distributor's business or of any ancillary business or both which has been negatively affected by the act of the manufacturer. "Ancillary business means a business owned by a wholesaler, a controlling stockholder of a wholesaler, or a controlling partner of a wholesaler, the assets of which are primarily used in transporting, storing, or marketing the brand or bands of malt beverage of the supplier with whom the wholesaler has an agreement; or a business owned by a wholesaler, a controlling stockholder of a wholesaler, or a controlling partner of a wholesaler which recycles returnable beverage containers; or any other business owned by a wholesaler, a controlling stockholder of a wholesaler, or a controlling partner of a wholesaler which business is primarily operated to benefit the wholesaler's ability to handle the brand or brands of malt

beverage of the supplier with whom the wholesaler has an agreement. "Controlling stockholder" or "controlling partner" shall mean a person with an ownership interest in the wholesaler of 50 percent or more. The value of the distributor's business or ancillary business shall include, but not be limited to, its goodwill.

(b) In the event the manufacturer and the beer distributor are unable to mutually agree on the reasonable compensation to be paid for the value of the distributor's business, as defined herein, the matter may by agreement of the parties be submitted to a neutral arbitrator to be selected by the parties and the claim settled in accordance with the rules provided by the American Arbitration Association. Arbitration costs shall be paid one-half by the distributor and one-half by the manufacturer. The award of the

arbitrator shall be final and binding on the parties.

(18) REMEDIES. -

(a) During the 90-day period provided in subsection (9) or during the 15-day period provided in subsection (10), either party, in appropriate circumstances, may bring action in the appropriate circuit court of this state to shorten the notice period so provided or to extend it pending a final determination of such proceedings on the merits.

(b) In any action brought under this section, the court shall have authority to grant temporary, preliminary, and final injunctive relief. If the court grants injunction relief, bond shall not be required to be posted.

(c) In addition to temporary, preliminary, or final injunctive relief, any person who shall be aggrieved or

injured in his business or property by reason of anything forbidden in this section may bring an action therefor in the appropriate circuit court of this state and, if successful shall recover the damages sustained and the costs of such action, including a reasonable attorney's fee.

(d) Without regard and in addition to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this section may bring an action to obtain a declaratory judgment that an act, action, or practice violates this section and to enjoin a manufacturer or distributor who has violated, is violating, or is otherwise likely to violate this section.

(e) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more

persons may bring a class action for the benefit of the whole, including actions for injunctive relief.

(f) In an action for money damages, if a judge or jury finds that the defendant acted maliciously, the judge or jury may award punitive damages as permitted by Florida law.

(g) The remedies provided in this subsection shall be in addition to any other civil remedies provided by law or in equity. Nothing contained in this subsection shall give rise to or foreclose any claim which would otherwise exist against the manufacturer or distributor by any proposed purchaser of the distributor's business.

(19) CONTRACTS AND THE VALIDITY THEREOF. - No manufacturer shall effect any sale to a distributor in Florida except pursuant to a written contract between the manufacturer and the distributor which contract is consistent

with the provisions of this section.

(20) REPURCHASE OF INVENTORY UPON TERMINATION. -

(a) Whenever any beer distributor enters into a franchise agreement with a manufacturer wherein the distributor agrees to maintain an inventory of beer and the franchise is subsequently terminated in accordance with this section and any circuit court injunction requested by the distributor has been denied or dissolved, the manufacturer shall repurchase the inventory as provided in this section. If the distributor has any outstanding debts to the manufacturer, then the repurchase amount may be credited to the distributor's account.

(b) The manufacturer shall repurchase that inventory previously purchased from him and held by the distributor on the date of termination of the contract. The manufacturer shall

pay 100 percent of the actual distributor cost, including freight and reasonable storage and handling costs, of all unsold beer.

(c) Upon payment within a reasonable time of the repurchase amount to the distributor, the title and right of possession to the repurchased inventory shall be transferred to the manufacturer.

(d) The provisions of this section shall not required the repurchase from a distributor of:

1. Any inventory which the distributor desires to keep, provided the distributor has a contractual right to do so.

2. Any inventory which as ordered by the distributor on or after the date of receipt of the notification of termination of the franchise or contractual agreement.

3. Any inventory which was

acquired by the distributor from any source other than the manufacturer.

(e) If any manufacturer shall fail or refuse to repurchase any inventory covered under the provisions of this section within 60 days after termination of a distributor's contract, he shall be civilly liable for 100 percent of the current wholesale price of the inventory plus any freight charges paid by the distributor, the distributor's reasonable attorney's fees, court costs, and interest on the current wholesale price computed at the legal interest rate provided in s.687.01 from the 61st day after termination.

(21) INDEMNIFICATION. - A manufacturer shall fully indemnify and hold harmless its distributor against - any losses, including, but not limited to, court costs and reasonable attorney's fees or damages arising out of complaints, claims, or lawsuits,

including, but not limited to, strict liability, negligence, misrepresentation, or express or implied warranty where the complaint, claim, or lawsuit relates to the manufacture or packaging of beer or other functions by the manufacturer which are beyond the control of the distributor. The distributor must mail written notice to the manufacturer on a prompt and timely basis after receipt of the notice of a complaint, claim, or lawsuit in order for the manufacturer to be liable under this subsection with respect to such complaint, claim or lawsuit.

APPENDIX 2

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO.: 87-969-CIV-ORL-19

GEARY DISTRIBUTING COMPANY, INC.,
Plaintiff,

v.

ALL BRAND IMPORTERS, INC.,

Defendant.
_____/

ORDER

This matter comes before the Court on the following Motions: (1) Defendant's Motion for Summary Judgment (Doc. No. 25, filed January 27, 1988), (2) Defendant's Supplemental Motion for Summary Judgment (Doc. No. 29, filed February 4, 1988, (3) Defendant's Renewed Motion for Summary Judgment (Doc. No. 47, filed October 5, 1988, (4) Plaintiff's Motion for Summary Judgment (Doc. No. 49, filed October 24, 1988), and supporting Memoranda and Affidavits submitted in support of or opposition to

these Motions.

A. FACTUAL BACKGROUND

Plaintiff is suing on an oral distributorship agreement it made with Defendant in 1977 or 1978 under which Plaintiff agreed to distribute beer for Defendant in Brevard County, Florida. The agreement was for perpetual duration subject to termination for either certain specified actions or other good cause. Both parties agree that the substance of their agreement is embodied in an unexecuted contract which Defendant signed in March of 1984.[1]

In September of 1987, Plaintiff agreed to sell these distributor rights to Grantham Distributing Company. Plaintiff acknowledges that it was required to obtain Defendant's consent

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[1]Plaintiff did not sign this contract because of a dispute concerning whether Plaintiff was an exclusive distributor for Defendant. Both parties agree that this agreement for all other purposes represents the arrangement between them.

to such sale but claims that Defendant initially approved the transfer. Plaintiff asserts that after this approval, Defendant withdrew its consent without notice, terminated the relationship with Plaintiff and thereafter reassigned Plaintiff's distributorship rights to another company.

Plaintiff claims that Defendant breached the contract by unreasonably withholding its consent to Plaintiff's proposed sale of the distribution right to Grantham. Plaintiff seeks compensatory damages, special damages, costs, interest, attorneys' fees and a permanent injunction.[2]

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[2]Plaintiff also sought a preliminary injunction against Defendant subsequent to the filing of the complaint. This Motion was denied after a hearing before the Court. (Doc. No. 28, filed January 29, 1988). This cause was referred to an arbitrator and is now before the Court for a de novo review pursuant to Local Rule 8.06 which requires that the Court "not admit evidence that there has been an arbitration proceeding, the nature or amount of the award, or any other matter

Defendant asserts that it did not terminate the relationship with Plaintiff but instead that it believed that Plaintiff had terminated the agreement when Plaintiff closed its warehouse. Defendant also asserts that it rejected the assignment to Grantham for a variety of bona fide business reasons." (Doc. No. 52, filed November 8, 1988).

B. LEGAL ARGUMENTS

1. Plaintiff's Claims

Plaintiff avers that this dispute in controlled by the statute governing relations between beer distributors and manufacturers which became effective on June 4, 1987. Fla. Stat. sec. 563.022 (1988). This statute would allow Plaintiff to recover damages if it is

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concerning the conduct of the arbitration proceeding,...." The Court has therefore conducted a de novo review of this case, despite Defendant's repeated references to the arbitration and its outcome. The Court notes that these references are improper and are in contravention of the Local Rule.

determined that Defendant terminated the distributorship relationship without good cause. According to Plaintiff, applying this statute to this case would not impair a pre-existing contract because (1) the specific language of the statute allows such application, and (2) Florida's common law rule regarding assignability of contracts is the same as that under the statute. Plaintiff also contends that if section 563.022 does not control this situation, then Florida Uniform Commercial Code sec. 672.201 applies. This section provides that an otherwise invalid oral contract for the sale of goods is valid if the party against whom enforcement is sought admits in sworn testimony that the contract was made.

Plaintiff denies that Florida's Statute of Frauds is applicable to this case on the grounds that (1) the written agreement which embodied the

relationship between the parties is sufficient to remove it from the Statute of Frauds (Fla. Stat. 725.01), and (2) the Statute is an affirmative defense which is given and therefore may be taken away by the legislature. Plaintiff asserts that the legislature intended that this affirmative defense would no longer be applicable in a case such as this when Florida Statute 563.022 was enacted. Plaintiff also claims that even if Florida Statute 563.022 does not apply to the contract, the Statute of Frauds is also not applicable because the oral contract was terminable within one year and therefore falls outside the purview of the Statute of Frauds. Lastly Plaintiff urges that even if the contract is terminable at will, Defendant is till required to give reasonable notice under the contract.

2. Defendant's Claims

Defendant asserts that summary

judgment is warranted for the following reasons: (1) the contract between the parties was an oral contract which was to be performed in more than one year and therefore violates the Florida Statute of Frauds, Florida Statute 725.01,[3] (2) the statute which controls the relations between beer distributors and manufacturers, Florida Statute 563.022, is inapplicable because it became effective after the parties entered into the agreement and to apply it retroactively would violate the constitutional prohibition against the impairment of contracts, and (3) even if the Statute of Frauds is inapplicable, Plaintiff's claims are barred by the terms of the parties' business relationship.

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[3]Defendant asserts that the Statute of Frauds and not the Florida Uniform Commercial Code controls this case because the dispute concerns a contract for services relating to the distribution of beer and related alcoholic beverages and not a contract for the sale of goods.

C. THE LAW

1. Which Statute Applies

The threshold question in this case is whether the statute controlling the relations between beer distributors and manufacturers (Florida Statute 563.022), the Statute of Frauds, (Florida Statute 725.01), or the Uniform Commercial Code, (Florida Statute 672.2-201), is applicable.

This is a case of first impression in the State of Florida. In a similar case, All Brand Importers, Inc. v. Tampa Crown Distributors, Inc., No. 84-1559-Civ-T-10 (M.D. Fla. November 9, 1987) (C.J. Hodges), aff'd, No. 88-3158, West slip op. at 1319 (11th Cir. Jan. 30, 1989), the Defendant also had an oral contract with Plaintiff under which Plaintiff agreed to buy beer from Defendant. Defendant argued that it had an oral contract with All Brand to develop a market and to act as sole

distributor for All Brand products for as long as its performance was satisfactory. Instead of applying Florida Statute 563.022 to the case, the Court found in favor of Defendant on the ground that the oral contract was within the Statute of Frauds because Defendant intended for the agreement to last beyond a year at the time the contract was created. All Brand, however, is not dispositive here because the dispute in that case arose prior to the enactment of Florida Statute 563.022. In the instant case, unlike All Brand, the agreement at issue was made prior to the enactment of section 563.022, but the dispute arose subsequent to its effective date.

Plaintiff here asserts that Florida Statute 563.022 is applicable because of the rule of statutory construction which provides that a later statute prevails when it contradicts an earlier statute,

in this case Florida Statute 725.01, and the two statutes can not be harmonized. In contrast, Defendant argues that this rule is not applicable because the cases cited by Plaintiff either concern inconsistencies within a single statute or two statutes specifically addressing the same subject.

In determining whether two statutes deal with the same subject, it must be determined whether the statutes relate to the same person or thing or to the same closely allied subject or object. State v. City of Riviera Beach, 397 So.2d 685, 689 (Fla. 1981), citing Singleton v. Larson, 46 So.2d 186 (Fla. 1950). Florida Statute 563.022(b)(2)(c) defines a franchise as "...a contract or agreement, wither expressed or implied, whether oral or written, for a definite or indefinite period of time in which a manufacturer grants to a beer distributor the right to purchase,

resell, and distribute any brand or brands offered by the manufacturer." The Statute of Frauds, Florida Statute 725.01, provides that:

> No action shall be brought...upon any agreement that is not to be performed in the space of one year from the making thereof, unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereto shall be in writing, and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized.

Based upon the express language of the two statutes, the Court concludes that both address the same subject, i.e., oral contracts which are made for an indefinite period of time. Therefore, the later, more specific

statute, Florida Statute 563.022, controls over the earlier, general statute, Florida Statute 725.01. See generally Marston v. Gainesville Sun Publishing Co., Inc., 341 So.2d 783 (Fla. 1st DCA), cert. denied, 352 So.2d 171 (1977).

2. Retroactive Application of the Statute

The next question is whether Florida Statute 563.022 is to be applied retroactively. Defendant asserts that "Florida legislation is presumed to operate prospectively unless the law on its face shows that the legislature intended retroactive operation." (Doc. No. 47, filed October 5, 1988). Subsection 15 of Florida Statute 563.022 expressly provides that the statute shall apply to "all written or oral agreements between a manufacturer and beer distributor in existence on June 4, 1987, as well as agreements entered into

or renewed after June 4, 1987." Thus the legislation on its face indicates that it was intended to affect all distributorship agreements in existence on or entered into after June 4, 1987.[4]

Plaintiff asserts that the reasoning of Paw Paw Wine Distributors, Inc. v. Seagram & Sons, Inc., No. G84-911 CA (W.D. Mich. December 8, 1987) should be applied to this case. In Seagram, Plaintiff distributors sued the manufacturer and the importer for, inter alia, breach of contract and violation of the Wine Franchise Act, M.C.L.A. 436.30 after Defendants terminated their wholesale wine distributorship

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[4]The Court notes that prior to final enactment of this law a Senate modification was attempted which provided that "[s]ection 2 of this Act shall not affect any written contract in existence as of May 29, 1987." See section 5, Ch. 87-63, Laws of Florida. It is believed that the reference to Section 2 was meant to refer to section 4, Ch. 87-63, which is in fact Section 563.022 of the Florida Statutes. Assuming that this modification was meant to apply to Florida Statute 563.022, the outcome in this case will not be affected.

agreements with Plaintiffs. The agreements were terminated without notice after the effective date of the Wine Act.

The Court tin Seagram determined that it was appropriate to apply the Wine Act to the agreements because the statute clearly indicated that the legislature intended it to be retroactively applied. The Court found that retroactive application did not substantially impair the contracts because the business area involved was already heavily regulated by the state and additional regulation should not have been unexpected. The Court also determined that the Wine Act's provisions were rationally related to the legislation's remedial goals, and finally the Court reasoned that the Act was not being applied to regulate contracts which were properly terminated before its effective date. While the

analysis in Paw Paw is instructive, it is not dispositive. Further analysis of the issue of impairment of contract is necessary under the facts of this case.

In evaluating whether a statute impairs a pre-existing contract, the U.S. Supreme Court has determined that the "...prohibition [against the impairment of contracts] must be accommodated to the inherent police power of the State to 'safeguard the vital interests of the people.'" Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983), quoting Home Building & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 434. A party must satisfy a three part test in order to demonstrate that a state statute has impaired a pre-existing contract: (1) that there has been a substantial impairment of a contractual relationship, (2) that the impairment is not justified by a "significant and

legitimate public purpose" and (3) that the impairment is not based upon reasonable conditions or that the impairment is not of a character appropriate to the public purpose justifying adoption of the legislation. Id. at 412-413.

a. Substantial Impairment

As to the first prong of this test, whether there has been a substantial impairment of a contractual relationship, Florida Statute 563.022(5)(b)(8) provides that an unfair and prohibited act is:

> [t]o prevent or attempt to prevent, by contract or otherwise, any beer distributor or any officer, member, partner, or stockholder of any beer distributor from selling or transferring any part of the interest of any of them to any other person or persons or party or parties. However, no distributor,

officer, partner, or stockholder shall have the right to sell, transfer, or assign the franchise or power of manage mentor control thereunder without the written consent of the manufacturer, distributor, or wholesaler, except that such consent shall not be unreasonably withheld.

Plaintiff asserts that there has not been a substantial impairment of contract because under the commonlaw, the rule governing assignability of contract when consent is required is the same as the rule established in the new statute.

The written memorialization of the contract which the parties agree they have entered provides:

16. Assignment

This Agreement and the distributorship created thereunder

> are personal to DISTRIBUTOR and may not be assigned nor the obligations imposed by it delegated in whole or in part, in fact or by operation of law, without the prior written consent of ABI, provided, that ABI may assign this Agreement to any of its subsidiaries or affiliates, or to the successors or assigns of all or substantially all of its business.

The issue thus becomes whether the agreement which is embodied by this language imposes on the parties obligations different from those contained in Florida Statute 563.022, or, in other words, whether under the Agreement the Defendant may arbitrarily withhold its consent or may it withhold consent only for good faith reasons.

Upon careful consideration, the Court concludes that the statute does

not impose any different obligations on the Defendant than the contract does. This conclusion is supported by three factors. First, the course of dealing between the parties indicates that the obligations under the agreement and the statute are the same. For example, the contract itself is guided by principles of good faith and reasonableness. This is evidence by the conditions under which Defendant can terminate the relationship: certain specific circumstances or other good cause. Defendant also accepted Plaintiff's assignment and delegation of other contracts it had with Plaintiff on two occasions prior to this dispute. Thus, the conditions under which Defendant could terminate the relationship and the prior course of dealing between the parties indicate that the good faith requirement is present under both the statute and the agreement.

Second, decisions from other jurisdictions indicate that a Defendant should be held to a good faith standard when the contract only gives it the authority to withhold its consent. In Larese v. Creamland Dairies, Inc., 767 F.2d 716 (10th Cir. 1985), the Court found that when a franchise contract only required the consent of a franchisor, this consent could not be unreasonably withheld. The Court explained:

> We do not find it an excessive infringement of the franchisor's rights to require that the franchisor act reasonably when the franchisee has decided that it wants out of the relationship. The franchisee should not be forced to choose between losing its investment or remaining in the relationship unwillingly when it

has provided a reasonable alternative franchisee.

Id. at 717-18.[5]

The United States Court of Appeals for the Ninth Circuit in Prestin v. Mobil Oil Corp., 741 F.2d 268, 269 (9th Cir. 1984) also has concluded that a franchisor may not arbitrarily withhold consent to an assignment when the sontract provides that any assignment mad without th ewritten consent of the franchisor would be void.[6]

---

[5]The Court in Larese found that the Colorado courts had never addressed this issue in the franchise context and therefore found it necessary to rely upon landlord-tenant law.

[6]In Prestin, the action was brought under the Petroleum Marketing Practices Act which provides that state law governs the assignability of franchises. Id. at 270. The franchisee had a service station lease and a retail dealer contract, both of which expressly provided that any assignment without Mobil's written consent would be void. The Court refused to treat the lease and the contract separately but instead found that both must be construed together as one contract. Therefore, the Cout would not apply the California Commercial Code, which explicitly allows parties to a contract to agree that a contract is not assignable, to the retail dealer contract.

Third, despite the fact that the Florida Courts have not addressed this issue directly, Florida's landlord-tenant law provides guidance. In Fernandez v. Vasquez, 397 So.2d 1171 (Fla. 3rd DCA 1981), after noting that lease disputes are governed by contract law, the court determined that[7]:

> a lessor may not arbitrarily refuse consent to an assignmentof a commercial lease which provides, even without limiting language, that a lessee shall not assign or sublease the premises without the written consent of the lessor. A withholding of consent to assign a lease, which fails the test for good faith and commercial reasonableness, constitutes a breach of the lease agreement.

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[7]Although the Court recognizes that there are distinctions between general property and landlord-tenant law on the one hand and distributorship law on the other hand, the Cout finds these decisions instructive.

Id. at 1174: see also Natural Kitchen v. American Transworld, 449 So.2d 855, 858 (Fla. 2d DCA 1984).[8]

The Court discerns no reason to make a distinction between the policy of law requiring a good faith reason to deny an assignment in the landlord-tenant context and the policy of law governing distributor agreements. The result is particularly appropriate where by so doing, a statute is upheld and contrary language is not contained in

---

[8]In Keis v. Hollub, 450 So.2d 251 (Fla. 3rd DCA 1984), the court applied a good faith requirement in the context of a restrictive covenant and found that even where a covenant grants an architectural control committee the "sole and uncontrolled discretion" to refuse to consent to the construction of any building, wall, fence or other structure or improvement of any nature, "[a] requirement for commercial reasonableness will be read into any contract where possible, language to the contrary notwithstanding." Id. at 255, n.5. The court decided that that Defendant was not required to remove the light poles installed for his tennis court because the committee's refusal was arbitrary where the erection of lighting on the previously approved tennis court was not expressly prohibited by the restrictive covenant and an intent to prohibit such lighting could not be reasonably read into the covenants.

the contract.[9]

Therefore, after reviewing Florida property law in general and landlord tenant law in particular, the decisions on franchise law and distributorship law in other circuits, and after considering the general course of dealing between the parties, the Court concludes that Florida Statute 563.022 does not substantially impair any rights which existed between the parties prior to the effective date of this statute.

b. Significant and Legitimate Public Purpose

Although the Court has found no substantial impairment of the contract, it will in an abundance of caution examine the second prong of the Energy Reserves test, whether the impairment is justified by a significant and legitimate public purpose. The instant

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[9]In fact, Defendant asserts that its rejection of the assignment was based on bona fide business reasons.

case involves an industry heavily regulated pursuant to the Twenty-FIrst Amendment. U.S. Const. amend. XXI. section 2. The United State Court of Appeals for the Fifth Circuit has stated that :

> ...any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme.

Castlewood Intern. Corp. v. Simon, 596 F.2d 638, 642 (5th Cir. 1979), vacated

and remanded on other grounds, 446 U.S. 949 (1980), panel opinion reinstated, 626 F.2d 1200 (1980).

Florida Statute 563.022(1) provides:

> (a) Regulation of business relations between beer distributors and manufacturers is necessary and appropriate in the public interest.
>
> (b) This section is enacted pursuant to authority of the state under the provisions of the Twenty-First Amendment to the United State Constitution to promote the public's interest in fair, efficient, and competitive distribution of malt beverage products by regulation and encouragement of manufacturers and distributors to conduct their business relations toward these ends...

Defendant asserts that the florida Supreme Court has held that a termination provision of another Florida alcoholic beverage statute was inapplicable to a distribution contract already in existence on the statute's effective date and that this reasoning should be applied to this case. Park Benziger & Co., v. Southern Wine & Spirits, 391 So.2d 681 (Fla. 1980).

Although in Park Benziger & Co. v. Southern Wine & Spirits, 391 So.2d 681 (Fla. 1980), the Court held that retroactive application of a statute may be a constitutional violation, in that case neither the statute nor its legislative history articulated what the objective of the legislation was.[10] Without this expression, the Court stated it was impossible to determine if

[10]The Florida Supreme Court found that it could not "...discern in the statue a public purpose of sufficient need to authorize an impairment of existing contractual agreements." Id. at 683.

the prohibition against passing laws which impair the obligation of contracts was overridden by the necessity for the state to exercise it police powers.

In contrast, in this case the legislature made specific findings of the need and purpose of the statute in sufficient detail to satisfy the Park Benziger requirement. Moreover, the Act does not deny Defendant the power to terminate the distributorship as a result of the assignment/delegation by Plaintiff; it merely restricts the timing, manner and rationale for the termination.[11]

c. Reasonable Conditions & Appropriate Character of the Statute

While the third prong of the Energy Reserves test does not need to be reached as a result of the analysis of the first two prongs of the test above,

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[11]Park Benziger also does not evidence the three part test developed by the United States Supreme Court in Energy Reserves, supra.

in an abundance of caution, however, the Court concludes that any minimal impairment of contract is based on reasonable conditions and justified by the articulated public purpose in the statute pursuant to a heavily regulated area of business.[12]

Conclusion

The Court finds that Florida Statute 563.022 is a legitimate method of regulating the distribution of alcoholic beverages. The provisions of the statute are rationally related to the legislation's goals, and the statute does not regulate contracts which were properly terminated before its effective date. The fact that the statute applies to contracts which were in existence prior to its effective date, but were

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[12]As a result of the conclusion that Florida Statute 563.022 is applicable, the Court need not reach the other defenses asserted by Defendant.

terminated subsequent to that date, does not alter the Court's conclusion that statute is constitutional.

Therefore, the Court finds that the Agreement between the parties is governed by Florida Statute 563.022 and that Plaintiff's action is not barred by the Statute of Frauds. To this extent, Plaintiff's Motion for Summary Judgment is GRANTED in part. Because material issues of genuine fact exist, the remainder of Plaintiff's Motion for Summary Judgment and Defendant's Motions for Summary Judgment are DENIED.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record

APPENDIX 3

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO.: 87-969-ORL-CIV-19

GEARY DISTRIBUTING COMPANY, INC.

Plaintiff,

vs.

ALL BRAND IMPORTERS, INC.

Defendant.

_____/

FINAL JUDGMENT

THIS CAUSE came on before the Court for non-jury trial on June 19, 1989, and after hearing testimony of the witness and argument of counsel and being duly advised in the premises, it is thereupon,

ORDERED AND ADJUDGED:

1. The Plaintiff, Geary Distributing Company, Inc., shall recover from the Defendant, All Brand Importers, Inc., damages in the amount of $75,000.00; interest from November

16, 1987, in the amount of $14,351.22; and attorneys' fees in the amount of $25,000.00; for a total sum of One Hundred Fourteen Thousand Three Hundred Fifty-one Dollars and Twenty-Two Cents ($114,351.22).

2. The total sum in paragraph one above shall accrue interest at the rate of twelve percent (12%) per annum until paid in full.

3. The Plaintiff, Geary Distributing Company, Inc., shall recover its costs of this action from the Defendant, All Brand Importers, Inc. The amount of costs shall be determined at a later hearing for which this Court specifically reserves jurisdiction.

FOR ALL OF WHICH LET EXECUTION ISSUE.

DONE AND ORDERED in Chambers at Orlando, Florida, this ____ day of June, 1989.

/s/ Robert R. Merhige, Jr.
ROBERT R. MERHIGE, JR.
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record

APPENDIX 4

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
CASE NO.: 89-3593

GEARY DISTRIBUTING COMPANY, INC.

Plaintiff/Appellee,

vs.

ALL BRAND IMPORTERS, INC.

Defendant/Appellant.

_____/

APPELLANT ALL BRAND'S STATEMENT OF THE ISSUE PRESENTED ON APPEAL

Pursuant to Rule 10(b)(3) of the Federal Rules of Appellate Procedure, the appellant All Brand Importers, Inc. ("All Brand") states that the single issue raised by its appeal of the Final Judgment entered by the District Court on June 21, 1989 is as follows:

> Whether the District Court erred in concluding as a matter of law that Section 563.022 of the Florida Statutes (Florida's beer

distribution statute)
superseded Section 725.01 of
the Florida Statutes
(Florida's Statute of Frauds)
and governed the determination
of this action?

Specifically, the plaintiff/ appellee brought this action in reliance upon the terms of an oral business agreement with the defendant/appellant. Subsequently, the defendant/appellant sought summary judgment pursuant to Section 725.01 and the decision of this court in All Brand Importers, Inc. v. Tampa Crown Distributors, Inc., No. 88-3158, West Slip Op. at 1319 (11th Circuit Jan. 30, 1989). By Order dated March 20, 1989, the court denied the defendant/appellant's summary judgment motion, ruling as a matter of law that Section 563.022 applied to this action and superseded Section 725.01.

At the time of it entry, the Court's Order of March 20, 1989 was not "final" for purposes of appeal. The Court's conclusion of law concerning the applicability of Section 563.022 was reaffirmed by the Court at trial and incorporated into the Final Judgment, entered on June 21, 1989. All Brand filed its Notice of Appeal on July 21, 1989.

Respectfully submitted,

/s/ Jeffrey R. Jontz
Jeffrey R. Jontz, Esq.
Florida Bar No. 133990
Richard M. Blau, Esq.
Florida Bar No. 347167
HOLLAND & KNIGHT
Post Office Box 1526
Orlando, Florida 32801
(305) 425-8500
Attorneys for Defendant/
Appellant
ALL BRAND IMPORTERS, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing has been served by

U.S. Mail to David H. Simmons, Esq., Drage, deBeaubien, Knight & Simmons, 120 South Orange Avenue, Post Office Box 87, Orlando, Florida 32801, this ___ day of August, 1989.

/s/ Richard M. Blau
Attorney

APPENDIX 5

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
CASE NO.: 89-3593

GEARY DISTRIBUTING COMPANY, INC.

Plaintiff/Appellee,

vs.

ALL BRAND IMPORTERS, INC.

Defendant/Appellant.

_____/

GEARY'S STATEMENT OF THE ISSUE PRESENTED ON CROSS APPEAL

Pursuant to Rule 10(b)(3) of the Federal Rules of Appealte Procedure, Appellee/Cross Appellant, Geary Distributing Company, Inc. ("Geary") states that the single issue raised by its appeal of the Final Judgment entered by the District Court on June 21, 1989 is as follows:

Whether the District Court erred in the amount of attorneys' fees that it awarded to Geary Distributing

Company, Inc.

Respectfully submitted,

/s/ David H. Simmons
DAVID H. SIMMONS, ESQ.
Florida Bar No.: 240745
Thomas F. Neal, Esq.
Florida Bar No.: 603368
Drage deBeaubein Knight & Simmons
120 S. Orange Avenue
Post Office Box 87
Orlando, FL 32802
(407) 422-2454
Attorneys for Geary

I HEREBY CERTIFY that a true and correct copy of the foregoing notice of Geary's Statement Issued on Cross Appeal has been furnished by U.S. Mail this ____ day of August, 1989, to: Jeffrey R. Jontz, Post Office Box 1526, Orlando, Florida 32801; and Richard Blau, Esq., Post Office box 1288, Tampa, Florida 33601.

/s/
Thomas F. Neal, Esq.

APPENDIX 6

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 89-3593

GEARY DISTRIBUTING COMPANY, INC.

Appellant/Cross-Appellee,

VS.

ALL BRAND IMPORTERS, INC.

Appellee/Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF FLORIDA

ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS-APPELLANT ALL BRAND IMPORTERS, INC.

HOLLAND & KNIGHT
Richard M. Blau, Esq.
Florida Bar # 347167
Stacy D. Blank, Esq.
Florida Bar # 772781
Post office Box 1288
Tampa, Florida 33601
(813) 227-8500
Attorneys for
ALL BRAND IMPORTERS, INC.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 28-2(b), counsel of record for the Appellant/Cross-Appellee, All Brand Importers, Inc., certifies that those identified below have an interest in the outcome of this case:

THE HONORABLE PATRICIA C. FAWSETT, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ("Judge Fawsett") presided over this action after its removal from the state court on November 2, 1987 until April 10, 1989, when responsibility for the action was transferred to a visiting judge sitting by designation. Presumably, Judge Fawsett will regain responsibility for this action in the event that post-appeal proceedings are required at the trial court level.

THE HONORABLE ROBERT R. MERHIGE, JR., JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ("Judge Merhige") assumed responsibility for the action as a visiting judge sitting by designation on April 10, 1989. Judge Merhige conducted the non-jury trial of this case on June 19, 1989, and entered a final judgment on June 21, 1989.

GEARY DISTRIBUTING COMPANY, INC. ("Geary") was the plaintiff in this action, and has an interest in the outcome of this case. Geary

Distributing Company, Inc. is a Florida corporation, and is solely owned and operated by William and Patricia Geary of 2011 Rockledge Drive, Rockledge, Florida 32955.

ALL BRAND IMPORTERS, INC. ("All Brand") was the defendant in this action, and has an interest in the outcome of this case. All Brand Importers, Inc. is a New York corporation with its principal place of business located at 430 New Park Avenue, Post Office Box 4159, Hartford, Connecticut 06147-4159. All Brand Importers, Inc. is a wholly owned subsidiary of Heublein, Inc.

DRAGE, DE BEAUBIEN, KNIGHT & SIMMONS serves as counsel for Geary Distributing Company.

HOLLAND & KNIGHT serves as counsel for All Brand Importers, Inc.

HOLLAND & KNIGHT
Richard M. Blau
Stacy D. Blank
Post Office Box 1288
Tampa, Florida 33601
(813) 227-8500
Attorneys for
ALL BRAND IMPORTERS, INC.

STATEMENT REGARDING ORAL ARGUMENT

Appellee/cross-appellant, All Brand, requests oral argument solely on the constitutional and statutory issues raised in its Initial Brief.

The appropriate construction of Florida's beer distribution statute, Section 563.022, Fla. Stat., will impact alcoholic beverage distributors throughout Florida, and will be of material importance to alcoholic beverage suppliers across the country. Additionally, this Court's construction of the state and federal constitutional prohibitions against contract impairment will relate to all members of the business community.

Oral argument is especially suited for the constitutional analysis required by this action, and will facilitate the Court's just resolution of this appeal.

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STATEMENT OF JURISDICTION

Jurisdiction for this action rests on diversity of citizenship between Geary and All Brand, pursuant to the provisions of 28 U.S.C. Sections 1332 and 1441(a).

This Court has jurisdiction over the appeal of this action pursuant to 28 U.S.C. Section 1291.

STATEMENT OF THE ISSUES

All Brand's Appeal: Whether the District Court erred in concluding as a matter of law that Section 563.022 of the Florida Statutes (Florida's beer distribution statute) superseded Section 725.01 of the Florida Statutes (Florida's Statute of Frauds) and governed the determination of this action?

Geary's Appeal: Whether the District Court erred in the amount of attorneys' fees that it awarded to Geary Distributing Company, Inc.?

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Geary initiated this lawsuit by filing its complaint in the Orange County Circuit Court on October 27, 1987. (RI-3-1, et seq).1 All Brand filed its petition for removal of this action to the District Court on October 31, 1987, based on diversity jurisdiction. (Rl-1-1). Removal of the case was acknowledged by the District Court on November 2, 1987. (Rl-3-1).

Beginning on January 27, 1988, the parties launched a series of competing motions for summary judgment (R2-25-1); (R2-29-1); (R2-47-1); (R2-49-1); (R3-65-1). All Brand argued the applicability of Florida's statute of frauds (Section 725.01, Fla. Stat.), while Geary argued the applicability of Florida's recently-adopted beer distribution statute (Section 563.022,

Fla. Stat.). (R4-47-3).

The District Court granted partial summary judgment to Geary in its Order of March 20, 1989, wherein Judge Fawsett ruled that Section 563.022 superceded Section 725.01, and applied to this action. (R3-62-7). The District Court's March 20th Order went on to find that several material issues of fact remained, requiring the case to proceed to trial. (R3-62-16).

Subsequently, a non-jury trial was held on June 19, 1989 before Judge Mehrige, sitting by designation. (R3-82-1). Judge Mehrige began the trial by acknowledging that the law of the case would comport with the March 20, 1989 Order issued by Judge Fawsett.

At the conclusion of the non-jury trial, Judge Mehrige read his verdict on liability and damages into the record. (SR at 2). At that time, Judge Mehrige

expressly offered to provide a full written opinion explaining the bases for the District Court's rulings to any party upon request. (SR at 2).

On June 21, 1989, a Final Judgment was entered by Judge Mehrige in favor of Geary and against All Brand. (R3-85-1). The Final Judgment awarded Geary $75,000 in compensatory damages, no punitive damages, prejudgment interest in the amount of $14,351.22, and attorneys' fees in the amount of $25,000, for a total sum of $114,351.22. (R3-85-1). Further, the Final Judgment provided that Geary was awarded its costs of the action, with the amount to be determined at a later hearing. (R3-85-1).

All Brand filed its Notice of Appeal on June 21, 1989. (R3-86-1). Geary filed its Notice of Cross-Appeal on August 2, 1989. (R3-81-1). Pursuant to Fed. R. App. P. 28(h), Geary is the

appellant/cross-appellee and All Brand is the appellee/cross-appellant for purposes of this appeal.

STATEMENT OF FACTS

All Brand is a foreign corporation authorized to do business as a wholesale supplier of alcoholic beverages throughout the State of Florida. (R2-52-2). At all times pertinent to this action, Geary was a Florida corporation that distributed alcoholic beverages between wholesalers and retailers. (R2-52-2).

From 1978 through 1987, Geary was authorized by All Brand to commercially distribute certain imported beer product lines (e.g. Moose Head beer) in certain Florida geographical markets (e.g. Orange County, Volusia County and Brevard County). (R2-52-2). Geary and All Brand conducted business pursuant to an oral agreement, and never executed a

binding, written contract. A written agreement memorializing the terms of the parties' existing oral contact was prepared and executed by All Brand, but not signed by Geary due to a dispute over the distributorship's exclusivity (R2-53-10, et seq.); aside from the issue of exclusivity, however, the March 15, 1984 memorial (the "Memorial") accurately reflected the terms of the business relationship between All Brand and Geary. (R2-47-13).

In 1985, Geary decided to cease operations in orange County, and sought to sell its operation to Jim Taylor Corporation. (R5-46). Pursuant to the terms of the parties' distribution agreement, Geary requested All Brand's approval to assign its authorized distribution rights to Jim Taylor Corporation. (R5-11, 46, 47). All Brand reviewed the proposed transaction,

evaluated Jim Taylor Corporation as a successor distributor, and ultimately approved Geary's request. (R5-46, 47, 100-01).

Geary also decided to sell its Volusia County operations to Central Florida Distributors. (R5-11). Again, pursuant to the parties' existing distributorship agreement, Geary requested All Brand's written consent to the proposed transaction. (R5-11).

In 1987, approximately ten years after Geary and All Brand first began doing business, and at a point of marginal or nonexistent profitability for the distributor, William Geary decided to retire as the head of a beer distribution business and sell what remained of his company's operations. (R2-52-2). All Brand's sales records indicated that Geary's purchase of product had diminished over time, and

that Geary made no requests of All Brand to purchase beer between March and October of 1987. (R2-52-2).

In September of 1987, William Geary announced to All Brand that he had agreed to sell his business in toto to Grantham Distributing Company. (R2-52-2). Contract documents drafted by Geary and Grantham, without All Brand's knowledge or participation, set the purchase price and terms of the sale. (R5-58, 59). According to the proposed Geary-Grantham transaction, William Geary would be paid an additional $75,000 if he could insure that Grantham would be designated as All Brand's authorized distributor for the Brevard County market. (R2-49-3).

By letter dated September 11, 1987, William Geary asked All Brand to evaluate and accept Grantham as All Brand's authorized distributor for the

Brevard County market. (R5-62). Under the terms of the existing All Brand-Geary business relationship, Geary's status as an authorized distributor of All Brand was personal to Geary, and could not be assigned or transferred without All Brand's prior written consent. (R3-62-2).

Pursuant to William Geary's request, All Brand reviewed Geary's proposed successor in accordance with All Brand's established evaluation criteria and procedures. (R2-52-3); (R5-91). Based on its review, All Brand determined that Grantham was not suitably qualified to serve as its authorized distributor in Brevard County for a variety of business reasons. (R2-52-3); (R5-91).

In response to All Brand's decision, Geary instituted this action against the supplier. (R2-52-3). Geary

sued All Brand for breach of contract and asserted that Section 563.022 of the Florida Statutes obligated All Brand to accept Geary's choice of Grantham to serve as All Brand's authorized distributor for the Brevard County market. (R3-62-2, 3).

THE STANDARD OF REVIEW

The issues raised on appeal by All Brand involve constitutional interpretation and statutory construction. These questions of laws are subject to de novo review by this Court.

The issues raised on appeal by Geary involve the District Court's discretion to award attorneys' fees. The "abuse of discretion" standard is appropriate for reviewing such issues.

SUMMARY OF THE ARGUMENT

In 1978, All Brand appointed Geary as its authorized distributor for

certain Florida markets. Under the terms of the parties' beer distribution agreement, the rights and privileges associated with being an authorized distributor of All Brand were personal to Geary and could not be assigned or sold to any third party without the prior written consent of the supplier.

In 1987, almost ten years after the establishment of the Geary-All Brand relationship, the Florida Legislature adopted legislation relating to the distribution of alcoholic beverages, including beer. Section 563.022 of the Florida Statutes provided new rights and benefits to distributors, and imposed previously non-existing obligations and burdens on suppliers.

Included among the new obligations of Section 563.022 was the requirement that a supplier allow its distributor to sell or assign distribution rights to a

third party of the distributor's own choosing. The statute provides that a supplier may object to a sale of distributorship rights where the proposed transaction is unreasonable; however, Section 563.022(9) shifts the burden of proof to the supplier and makes it clear that the distributor's sale will be upheld unless the supplier can affirmatively demonstrate the unreasonableness of the transaction. Despite the fact that these obligations were previously non-existent at law, the Legislature provided that the new statute would apply to existing as well as future distributorship relationships "to the full extent consistent with the constitutions and laws of this state and the United States." 563.022(1)(c), Fla. Stat. (1987).

At issue in this case is whether the District Court unconstitutionally

impaired All Brand's existing contract rights by retroactively applying Section 563.022 to the parties' preexisting distribution agreement. Under the three-part federal analysis enunciated by Energy Reserves Group, Inc. v. Kansas Power and Light Co.,2 as well as the stringent Florida analysis described in Pomponio v. Claridge of Pompano Condominium, Inc.,3 the record demonstrates that retroactive application of Section 563.022 to the facts of this case violates the Florida and U.S. Constitutions.

Substantial Impairment

The record is clear that application of Section 563.022 materially alters the parties' existing distributorship agreement. All Brand had nothing to do with William Geary's decision to close shop and sell his company, and did not object to his doing

so. Under the terms of the parties' existing distributorship agreement, All Brand reasonably expected that it retained unilateral authority to decide who would represent its products in Brevard County after Geary ceased operations.

All Brand's reasonable expectations concerning its contract rights were shattered by the District Court's retroactive application of Section 563.022. For example, retroactive application stripped All Brand of its unfettered ability to do business with an authorized distributor of its own choosing. Moreover, retroactive application of Section 563.022 not only imposed the new standard of reasonableness referenced by the District Court's March 20th Order, but also shifted the burden of proof to require that All Brand affirmatively

demonstrate the reasonableness of its actions; this burden shifting was not acknowledged or addressed in the District Court's analysis.

By retroactively applying Section 563.022 to the pre-existing business relationship between Geary and All Brand, the District Court substantially impaired All Brand's contractual rights, including All Brand's right to select an exclusive distributor of its own choosing as a successor to Geary. The District Court erred by failing to assess accurately the scope of All Brand's contract impairment.

No Significant And Legitimate Public Purpose

The record is equally clear that the substantial impairment caused by retroactive application of Section 563.022 in this case is not justified by any significant and legitimate public

purpose. The statute's "legislative findings" focus on the promotion of fair, efficient and competitive distribution of malt beverage products; in fact, the statute is nothing more than narrow, special interest legislation that cannot overcome the constitutional prohibitions against contract impairment.

Moreover, the statute's purported goals are not advanced by retroactively applying Section 563.022 to this case. The majority of the rights and obligations imposed in Section 563.022 relate to the protection of active and ongoing distributors from various unfair and coercive trade practices; these provisions have no relevance to Geary, which was closing its business and selling its assets to an unrelated third party. The remaining provisions of Section 563.022 relate to compensating

distributors who have been injured by the unfair or unconscionable actions of a beer manufacturer or supplier acting in bad faith; in this case, the District Court found no evidence of bad faith by All Brand against Geary. There is no significant and legitimate public purpose justifying retroactive application of Section 563.022 to the facts of this case. The District Court erred in concluding otherwise.

Unreasonable Result

Finally, even accepting the District Court's conclusions concerning the statute's impairment and purpose, the contractual impairment resulting from the March 20th Order is unreasonable because retroactive application of Section 563.022 to the facts of this case will have no impact on the ultimate distribution of All Brand's beer products in Brevard County,

Florida. Retroactive application of the statute will not reopen Geary's distribution business because Geary never sought reinstatement as All Brand's distributor; William Geary only wanted to sell his business. Retroactive application of Section 563.022 will not displace All Brand's existing Brevard County distributor (Jim Taylor Corporation) with the purchaser of Geary (Grantham Distributing Company); neither the District Court's Final Judgment nor the plaintiff's appellate claims call for substitution of All Brand's present Brevard County distributor. Actually, the only impact of retroactive application in this case is to abrogate the terms of the parties' pre-existing agreement and compel All Brand to pay Geary an unforeseen windfall of $75,000, plus costs and attorneys' fees. Such a result is both

unreasonable and unjust.

Accordingly, this Court should overrule the conclusions of law concerning the retroactive application of Section 563.022 of the Florida Statutes, as set forth in the District Court's Order of March 20, 1989. The District Court's Final Judgment of June 21, 1989 should be reversed, and this case should be remanded to the District Court for entry of judgment for All Brand in conformity with existing law. See All Brand Importers, Inc. v. Tampa Crown Distributors, Inc., 864 F. 2d 748, 749 and accompanying appendix (11th Cir. 1989).

ARGUMENT

I. THE DISTRICT COURT'S RETROACTIVE APPLICATION OF SECTION 563.022 UNCONSTITUTIONALLY IMPAIRED ALL BRAND'S PRE-EXISTIMG CONTRACT RIGHTS

Introduction

All Brand and Geary established their distributorship agreement in 1978.

Although the parties chose to do business pursuant to an oral contract, the terms of their distribution agreement were memorialized in a partially executed document dated March 15, 1984.4

Ten years after the implementation of the distribution agreement between Geary and All Brand, the Florida Legislature adopted Section 563.022 of the Florida Statutes. The law mandated substantial changes in the way beer suppliers and distributors conducted business; for example, subsection (19) of the statute prohibited oral contracts for beer distribution. See 563.022(19), Fla. Stat. (1987). Yet, the new statute also expressly provided that it would apply to all contracts in effect as of June 4, 1987, including those oral contracts that subsection (19) simultaneously outlawed. See

563.022(15), Fla. Stat. (1987).

The conflict between the parties' pre-existing distribution agreement and the Legislature's 1987 beer distribution statute is the core issue of this appeal. In its partial summary judgment Order of March 20, 1989, the District Court ruled that retroactive application of Section 563.022 did not interfere with the parties' pre-existing agreement to the point of being an unconstitutional impairment of contract. The record, however, demonstrates that the District Court erred in its analysis.

Under both Florida and federal constitutional law, it is clear that retroactive application of Section 563.022 unjustly and unconstitutionally deprived All Brand of rights to which it was entitled by contract. For the reasons set forth below, the District

Court's partial summary judgment Order of March 20, 1989 should be reversed.

Analysis of Florida and Federal Prohibitions Against Contract Impairment

Both the Florida and United States Constitutions prohibit laws impairing the obligations of contracts. Park Benziger & Co. v. Southern Wine and Spirits, Inc., 391 So.2d 681, 683 (Fla. 1980) (citing U.S. Const. art. I, section 10, cl. 1; Fla. Const. art. I, section 10). These constitutional provisions impose limits upon the Legislature's power to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242, 16, 57 L.Ed.2d 727, 734 (1978); Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557, 559 (Fla. 1975). Although the Twenty-First Amendment to

the United States Constitution recognizes each state's broad authority to regulate the sale and distribution of liquor within its borders, such regulation must fall if it violates a constitutional prohibition. Park Benziger & Co., 391 So.2d at 683, citing Craig v. Boren, 429 U.S. 190, 50 L.Ed.2d 397 (1976), reh. den., 429 U.S. 1124, 51 L.Ed.2d 574 (1977). This is especially true in Florida, where the constitutional prohibition against contract impairment is rigidly enforced:

> Both the United States and the Florida Constitutions provide that no law impairing the obligation of contracts shall be passed. Exceptions have been made to the strict application of these provisions when there was an overriding necessity for the state to exercise its police powers, but virtually no degree of contract impairment has been tolerated in this state.

Park Benziger & Co., 391 So.2d at 683 (citation and footnote omitted); see Fort Lauderdale v. State ex rel. Elston

Bank & Trust Co., 169 So. 584 (Fla. 1936) (subsequently passed statute materially altering remedies originally afforded by contract violate Florida Constitution's prohibition against contract impairment and cannot be enforced).

The District Court's March 20th Order correctly identified the three-part federal analysis required to determine whether the retroactive application of a statute violates the U.S. Constitution by impairing the obligation of an existing contract. In Energy Reserves Group, Inc. v Kansas Power and Light Co., 459 U.S. 400, 74 L.Ed.2d 569 (1983), the United States Supreme Court identified three inquiries necessary to determine whether a statute unconstitutionally impaired existing contract rights:

> Whether the state law has, in fact, operated as a substantial

> impairment of a contractual relationship....
>
> If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem....
>
> (W)hether the adjustment of "the rights and responsibilities of contracting parties (is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying (the legislation's] adoption."

Energy Reserves, 459 U.S. at 411-12, 74 L.Ed.2d at 580-81 (citations omitted).

When construing the Florida Constitution's prohibition against the impairment of contracts, Florida courts consider federal interpretations of the U.S. Constitution's parallel provision to be helpful and persuasive, but not necessarily controlling. Pomponio v. Claridge of Pompano Condominium Inc., 378 So.2d 774, 779 (Fla. 1980). The Florida Supreme Court has formulated its

own analysis for determining when the retroactive application of a statute violates the Florida Constitution's prohibition against the impairment of contracts:

> Our conclusion in Yamaha that "virtually" no impairment is tolerable necessarily implies that some impairment is tolerable, although perhaps not so much as would be acceptable under traditional federal contract clause analysis.
>
> To determine how much impairment is tolerable, we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy. Obviously, this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective.

Pomponio, 378 So.2d at 780 (emphasis added).

Application of Contract-Impairment Analysis to This Case

The District Court's March 20th Order employed the Energy Reserves analysis and concluded that (1) the terms of Section 563.022 did not substantially impair or conflict with the terms of the parties' pre-existing distributorship agreement; (2) the purpose served by Section 563.022 is a sufficiently significant and legitimate benefit to the public so as to justify the contract impairment caused by retroactive application of the statute; and (3) any contractual impairment imposed upon the parties was reasonable under the circumstances.

The District Court's March 20th Order is erroneous for several reasons. The District Court did not account for the strict enforcement accorded Article One, Section 10 of the Florida Constitution by Florida courts. Moreover, a careful review of the record

demonstrates that the District Court's March 20th Order failed to accurately recognize the degree to which retroactive application of Section 563.022 produced a material and substantive impairment of All Brand's rights under the parties' pre-existing distribution agreement. Nor did the District Court adequately scrutinize the purported public purpose of the statute.

As set forth in greater detail below, application of the Energy Reserves three-part test to the record in this case (to say nothing of the stringent analysis required by Florida courts in construing the Florida Constitution) demonstrates that retroactive application of Section 563.022 resulted in an unconstitutional impairment of the parties' contract. The District Court's March 20th Order is erroneous, and must be reversed.

A. SUBSTANTIAL IMPAIRMENT

A contract is impaired by a statute that alters the contract's terms, imposes new conditions or lessens the contract's value. See Yamaha Parts Distributors Inc. v. Ehrman, 316 So. 2d 557, 559-60 n. 12 and accompanying text. The first inquiry of a contract impairment case must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship; severe impairment will push the inquiry to a careful examination of the nature and purpose of the state legislation. Allied Structural Steel Company v. Spannaus., 438 U.S. 234, 244-45, 57 L.Ed.2d 727, 736-37 (1978).

The District Court's March 20th Order concluded that retroactive application of Section 563.022 did not substantially impair All Brand's

pre-existing contract rights. The District Court found that Section 563.022's only impact on the parties' existing distribution agreement; was to impose a good faith requirement on All Brand (R3-6210); that the good faith obligation already existed as part of the parties' distribution agreement (R3-62-11); and that any such imposition was not a substantial impairment because good faith constitutes an implied component of the parties' distribution agreement by operation of Florida law (R3-6212, 13). The record demonstrates that the District Court erred in each of those three conclusions.

With regard to the specific contractual impairments resulting from retroactive application of Section 563.022, the District Court should have recognized several areas of impact. First, retroactive application stripped

All Brand of its unfettered ability to do business with an authorized distributor of its own choosing.5 Second, retroactive application imbued the parties' distribution agreement with legal rights of enforceability, including possible entitlement to punitive damages and attorneys' fees, that were previously not available under Florida law due to the absence of a written contract.6 Third, retroactive application not only imposed the standard of reasonableness referenced by the District Court's March 20th Order, but also shifted the burden of proof to require that All Brand affirmatively demonstrate the reasonableness of its actions.7 None of these contractual impairments was adequately addressed in the District Court's March 20th order.

With regard to the District Court's conclusion that the parties'

distribution agreement already contained a good faith obligation, the record again demonstrates that the analysis of the March 20th order is flawed. The parties' agreement expressly provided that Geary's status as an authorized distributor was personal to Geary, and could not be assigned or sold without Geary's consent. Moreover, nothing in the record indicates that All Brand ever relinquished its complete and unfettered control over the designation of authorized distributors. In fact, the record shows that Geary sold portions of its operations on two occasions prior to the dispute underlying this case; on each occasion, All Brand insisted on conducting its own review of the designated purchaser according to its own criteria before permitting the proposed transfer of distributor rights to occur. This unfettered exercise of

contractual authority is a far cry from the statute's reasonableness standard and accompanying shift of burden.

Finally, with regard to the District Court's contention that a good faith/reasonableness standard could be implied from existing Florida landlord-tenant law and the decisions of other jurisdictions, the record once again demonstrates otherwise. Substantial case law holds that statutory limitations on the termination and transfer of distributorships fundamentally impair pre-existing agreements. In Globe Liquor Company v. Four Roses Distillers Company, 281 A. 2d 19 (Del. 1971), cert. den. 404 U.S. 873, 30 L.Ed.2d 117 (1971), the Delaware Supreme Court held that a state "franchise security law" which limited the supplier's right of termination by

imposing a good faith requirement could not be applied to a preexisting liquor franchise. Id. at 21. The Florida Supreme Court has acknowledged the rationale of Globe Liquor Co. and cited the Delaware Supreme Court's opinion with approval. See Park Benziger & Co. v. Southern Wine & Spirits, Inc., 391 So.2d 681, 684 n. 5 and accompanying text (Fla. 1980).

Similarly, the federal appellate court's decision in Garris v. Hanover Insurance Company, 630 F. 2d 1001 (4th Cir. 1980), articulated the importance of contract rights that provide a party with complete discretion:

> ... the right of unilateral termination upon sixty days notice for which Hanover bargained must be accounted a critical feature of its total contractual relationships with its agents. It insured that an unprofitable relationship or one simply plagued with nagging personal or administrative problems that made its overall value questionable could be cut off without any expense or delay

> arising from need to justify it either out of court or in court. In view of the obvious value of this contractual right, Hanover's reliance upon it as a critical aspect of its agency relationship is manifest. The challenged legislation severely modified this contractual right.

Garris, 630 F. 2d at 1006. This analysis is certainly applicable to All Brand's contractual right to designate authorized distributors of its own choosing.

Legislation that rewrites a distributorship agreement to strip a supplier of its unfettered authority to designate its authorized distributors has a heavy, direct impact on the supplier-distributor relationship, and such agreements are entitled to the protection of constitutional prohibitions against impairment of contract. See, e.g. Birkenwald Distributing Co. v. Heublein, Inc., 776 P.2d 721, 725 (Wash. App. 1989) (beer

supplier's contractual authority to approve any transfer of distributorship rights was tantamount to power of termination at will; impairment of that contractual authority by retroactively-applied statute rendered statute unconstitutional); cf. Fornaris v. Tool Co., 423 F.2d 563, 567-68 rev'd. on other grounds, 400 U.S. 41, 27 L.Ed.2d 174 (1970) (costs of converting at will relationship to "good cause" constitute substantial contract impairment); Shell v. Metropolitan Life Insurance Co., 380 S.E.2d 183, 190-91 (W.Va. 1989) (retroactively applied statute's conversion of at-will termination authority into termination-forecause resulted in substantial impairment of contract). The District Court's March 20th Order failed to assess these considerations properly, and as a result erred in

concluding that Section 563.022 did not substantially impair All Brand's pre-existing contract rights.

B. NO SIGNIFICANT AND LEGITIMATE PUBLIC PURPOSE JUSTIFYING RETROACTI[VE APPLICATION.

Only in unusual cases will the police power of a state sustain legislation that impairs an existing contractual obligation. See Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557, 559 n.9 and accompanying text (Fla. 1975). The District Court's Order of March 20, 1989, assumed that statutes regulating alcohol distribution are entitled to a presumption of constitutionality by virtue of the TwentyFirst Amendment. Although the State of Florida does possess authority to regulate the sale and distribution of liquor within its borders pursuant to the Twenty-First Amendment,, that authority is insufficient to justify the

retroactive application of Section 563.022 in this case.

Addressing the tension that exists between the TwentyFirst Amendment and the constitutional prohibition against impairment of contracts, the Florida Supreme Court made its position clear:

> [T]he fact that intoxicating beverages is the subject matter of legislation does not automatically make such legislation valid, and such an act must fall if it violates a constitutional prohibition. In Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451, 50 L.Ed.2d 397 (1976), the Court struck down an Oklahoma law setting the drinking age for males at 21 and for females at 18 as a violation of equal protection. In Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 84 S. Ct. 1293, 12 L.Ed.2d 350 (1964), the Supreme Court held that New York's liquor licensing law did not extend to a company headquartered at the New York Port Authority whose sale of liquor commenced outside the continental limits of the United States. This Court in Division of Beverage, Department of Business Regulation v. Bonanni Ship Supply, Inc., 356 So.2d 308 (Fla. 1978), held that a statute regulating export activity of "in bond" liquor was subject to a previous federal regulatory scheme

> and was, therefore, in violation of the commerce clause of the United States Constitution.
>
> Both the United States and the Florida Constitutions provide that no law impairing the obligation of contract shall be passed. Exceptions have been made to the strict application of these provisions when there was ah overriding necessity for the state to exercise its police powers, but virtually no degree of contract impairment has been tolerated in this state.

Park Benziger & Co. v. Southern Wine & Spirits, Inc., 391 So.2d 681, 683 (footnote and citations omitted). The Florida Supreme Court in Park Benziger & Co. went on to rule that the retroactive application of a state statute regulating the distribution and sale of intoxicating liquor unconstitutionally impaired a liquor manufacturer's pre-existing contractual authority to unilaterally withdraw a particular brand of alcoholic beverage from a distributor without going through the procedures mandated by the new statute. Id. at

682-84. Most significantly, the Florida Supreme Court observed that a statute aimed at preventing the monopolistic control of distributors by manufacturers of intoxicating liquors would not be of sufficient public importance to warrant impairment of private contract rights. Id. at 683 nn.3, 4 and accompanying text.8

A careful review of Section 563.022 reveals that it is a narrow statute of limited public benefit. See Jacobsen v. Anheuser-Busch, Inc., 392 N.W. 2d 868, 874-75 (Minn. 1986), cert. den. 479 U.S. 1060, 93 L.Ed.2d 991 (1987) (Minnesota beer distribution statute similar to Section 563.022 was found to be more of a private interest law than a statute of important public purpose). In fact, Florida's beer distribution statute is an example of special interest legislation that has

little effect on the public welfare; such statutes, purporting to protect distributors against their suppliers, are of insufficient public importance to warrant retroactive application to pre-existing distributorships. See, e.g. Birkenwald Distributing Co. v. Heublein, Inc., 776 P.2d 721 (Wash. App. 1989) (statute's self-declared purposes of promoting fairness, efficiency and competitive distribution between beer suppliers and distributors did not disguise the law's special interest nature; retroactive application of the statute unconstitutionally impaired beer supplier's previously unrestricted contract rights); Jacobsen v. Anheuser-Busch, Inc., 392 N.W. 2d 868, 874-75 (Minn. 1986), cert. den. 479 U.S. 1060, 93 L.Ed.2d 991 (1987) (beer distribution statute retroactively imposing a legal duty on beer supplier

to approve beer distributor's proposed transferee deemed to be primarily special interest legislation favoring wholesale distributors, and not of such important, broad or general significance as to justify retroactive application); United States Brewers' Association v. State, 220 N.W. 2d 544, 54849 (Neb. 1974); Globe Liquor co. v. Four Roses Distillers Co., 281 A. 2d 19 (Del.), cert. den. 404 U.S. 873, 30 L.Ed.2d 117 (1971).

When an impairment is sufficiently "severe" and there is no showing of an "important general social problem," the presumption favoring legislative judgment as to the necessity and reasonableness of a particular measure cannot stand. Allied Structural Steel Company v. Spannaus, 438 U.S. 234, 247, 57 L.Ed.2d 727, 738 (1978). In this case, material and substantive contract

rights exercised by All Brand for the previous ten years were unexpectedly eliminated by the District Court's retroactive application of special interest legislation. These facts override any reliance on the Twenty-First Amendment and demonstrate an unconstitutional impairment of All Brand's pre-existing contracts rights. See Jacobsen v. Anheuser-Busch, 392 N.W.2d 868, 872 (Minn. 1986), cert. den. 479 U.S. 1060, 93 L.Ed.2d 991 (1987) (where state law did not regulate termination or transfer of distribution rights and such regulation was not foreseen when parties contracted, it -does not matter that liquor distribution was heavily regulated at the time).

C. UNREASONABLE RESULT

In its March 20th Order, the District Court made only passing

reference to the third inquiry of the Energy Reserves analysis. In a single sentence, the Court concluded without explanation that "any minimal impairment of contract is based on reasonable conditions and justified by the articulated public purpose in the statute pursuant to a heavily regulated area of business." (unrelated footnote omitted). (R3-62-16).

The record demonstrates that the statute's retroactive application produced more than minimal impairment to All Brand's pre-existing contract rights, while achieving less than the substantial and legitimate public purpose required by the Florida and U.S. Constitutions. Even accepting the District Court's summary characterization on these points, reversal is still necessary because retroactive application of Section

563.022 to this case is unreasonably injurious under the Florida law analysis of Pomponio, and fails the third inquiry of the federal law set analysis forth in Energy Reserves.

Retroactive application of section 563.022 to the facts of this case is unreasonable in two ways. First, the manner in which the Florida Legislature acted by adopting Section 563.022 is not the least restrictive means possible. See Energy Reserves Group, Inc. v. Kansas Power and Light Company Co., 459 U.S. 400, 418, 74 L.Ed.2d 569, 585 (1983); Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774, 781-82 (Fla. 1979). For example, if the statute's true purpose is to promote fair, efficient and competitive distribution of malt beverage products, then the legislation's new requirements regarding consent for the transfer of

distribution rights should not have been extended to distributors that were closing shop or otherwise withdrawing from the market place. In this case, Geary had closed its warehouse and ceased operations in connection with the sale of its assets. Section 563.022's purported goals could have been achieved without giving the departing distributor authority to dictate All Brand's future course of dealings.

Second, and equally unreasonable, is the fact that retroactive application of Section 563.022 to this case will do nothing to advance the statute's purported goals. As reflected by the record, retroactive application of the statute will not reopen Geary's business because Geary never sought reinstatement as All Brand's distributor; William Geary only wanted to sell his business. Nor will retroactive

application of Section 563.022 displace All Brand's existing Brevard County Distributor (Jim Taylor Corporation) with the purchaser of Geary (Grantham Distributing Company); neither the District Court's Final Judgment nor the plaintiff's appellate claims call for substitution of All Brand's present Brevard County distributor.

The true result of retroactively applying Section 563.022 in this case is to abrogate the terms of the parties' pre-existing agreement. As a result of the District Court's actions, All Brand is compelled to pay Geary an unforeseen windfall of $75,000, plus costs and attorneys' fees producing a total in excess of $114,000. Such a result is both unreasonable and unjust. See Pomponio, 378 So.2d at 781-82.

The unreasonable impact of Section

563.022's retroactive application is clearly evidenced by a careful analysis of the record in this case. The District Court erred by failing to undertake this analysis in its Order of March 20, 1989.

Accordingly, for the reasons set forth above, the District Court's Order of March 20, 1989 should be reversed.

II. IF SECTION 563.022 APPLIES TO THIS CASE, THE DISTRICT COURT DID NOT ERR IN AWARDING REASONABLE ATTORNEYS' FEES.

The foregoing arguments makes clear that Geary was not entitled to negate the terms of its distribution agreement with All Brand by invoking Section 563.022, Florida Statutes. Because Section 563.022 is inapplicable to this case, Geary is not entitled to a statutory award of attorneys' fees as the prevailing party. Accordingly, Geary's arguments regarding attorneys'

fees are moot.

However, if this Court should decide that Section 563.022 is applicable to the facts of this case, the District Court's award of attorneys' fees should stand undisturbed. Geary's appeal should be rejected for two reasons. First, Geary cites no authority to substantiate its claim of entitlement to a separate hearing on the issue of attorneys' fees. Second, prior to its initiation of this appeal, Geary failed to request a written opinion from Judge Mehrige which would have set forth the bases of the District Court's attorneys' fee award.

A. GEARY FAIELED TO CITE AUTHORITY ENTITLING IT TO A SEPARATE HEARING ON ATTORNEYS' FEES.

The awarding of attorneys' fees is procedural in nature and therefore is governed by federal law. See Miami Children's Hospital v. Tamayo, 529 So.2d

667, 668 (Fla. 1988) (stating that factors utilized in determining reasonable attorneys' fees are procedural); Cheek v. McGowan Electric Supply Company, 511 So.2d 977, 979 (Fla. 1987)
(determining that attorneys' fee award is not part of substantive claim for damages). Although contrary to its primary position, Geary concedes that the attorneys' fee issue before this Court may in fact be governed by federal law. See G.I.B. at 6.
The federal guidelines governing an award of attorneys' fees are set forth in Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714 (5th Cir. 1974). However, Geary has cited no federal case holding that a separate hearing is required by the guidelines in Johnson.

Instead, Geary focuses its argument mainly on Florida law. Geary claims

that Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), entitles a party to a separate hearing on attorneys' fees. Geary cites as authority for that proposition Staff v. Trafalgar Developers of Florida, Inc., 518 So.2d 981 (Fla. 2d DCA 1988), and Massey v. Watson, 508 So.2d 740 (Fla. 2d DCA 1987). See G.I.B. at 5-6. Neither Staff nor Massey states that Rowe requires a separate hearing on fees.9

B.GEARY FAILED TO REQUEST A WRITTEN OPINION DETAILING THE BASIS OF THE DISTRICT COURT'S RULINGS.

Following a non-jury trial, Judge Mehrige convened the District Court on January 20, 1989 to render his verdict in the case. Judge Mehrige declined to issue a written opinion following the close of the trial, but the Judge expressly advised both parties that he would provide a written opinion fully expounding the bases of his decision at

either party's request. See footnote 1, supra. Consequently, the requisite factors considered by the trial judge in awarding Geary its attorneys' fees are not reflected in a written opinion. Geary, instead of requesting such an opinion from the trial judge, appealed the fee award immediately. Such an appeal is inappropriate.

Geary now seeks to circumvent the District Court's fee award by claiming that Judge Mehrige failed to consider the factors set forth in Johnson or Rowe. In fact, Judge Mehrige provided Geary with an opportunity to receive a written opinion that would reflect the factors considered by District Court in determining the attorneys' fee award. However, Geary failed to request such a written opinion.

Under these circumstances, Geary should not be allowed to argue that the

District Court failed to consider the appropriate factors. Geary should have requested that Judge Mehrige prepare a written opinion reflecting the factors considered by the District Court in awarding Geary its attorneys' fees. If that written opinion revealed that the District Court failed to comply with the requirements of Johnson or Rowe, Geary then would have been in a position to appeal the District Court's attorney fee award. Because of its own failure to act, however, Geary should not be permitted to pursue this appeal.

CONCLUSION

The District Court's Order of March 20, 1989, ruled as a matter of law that Section 563.022 of the Florida Statutes could be retroactively applied to this case without violating the prohibitions against contract impairment contained in the Florida and United States

Constitutions. As demonstrated by the record and the arguments set forth above, the District Court's conclusions of March 20th are erroneous. Therefore, this Court should reverse the District Court's ruling of March 20, vacate the Final Judgment of June 21, 1989, and remand the case for entry of judgment for All Brand in conformity with existing law. See All Brand Importers, Inc. v. Tampa Crown Distributors, Inc., 864 F.2d 748 (11th Cir. 1989).

Because the District Court erred in ruling that Section 563.022 retroactively applied to this case, Geary has no statutory basis upon which to claim an entitlement to attorneys' fees. Consequently, Geary's appeal on the issue of attorneys' fees is moot.

However, even if this Court should uphold retroactive applicability of Section 563.022 the District Court's

award of attorneys' fees should stand undisturbed. Geary failed to cite authority entitling it to a separate hearing on the issue of attorneys' fees. Moreover, Geary failed to request from the District Court a written opinion setting forth the faces of the trial judge's award of attorneys' fees.

FOOTNOTES:

1 In this brief, citations to the record will be referred to as ("R_-_-_") and will include the volume number, docket number, and page number of each reference. Citations to transcripts of the trial below will be referred to as ("R_-_") and will include the volume number assigned by this Court and page number. Citations to Geary's Initial Brief will be referred to as ("G.I.B. _"). All Brand has filed a motion to supplement the record with an additional excerpt from the trial transcript. In order to comply with the briefing schedule, All Brand has filed this brief with references to the supplemental excerpt indicated as ("SR ___").

2 459 U.S. 400, 74 L. Ed.2d 569 (1983)

3 378 So. 2d 774 (Fla. 1979)

4 The District Court's Order of March 20, 1989 notes that Geary did not sign the written agreement proposed by All Brand in 1984 due to a dispute over the exclusivity of Geary's distributorship. In all other terms and respects, however, the writing accurately reflected the parties' oral contract. See Order dated March 20, 1989 at 2 n. 1 and accompanying text. (R3-62-2).

5 The written Memorial of the parties' distribution agreement evidences All Brand's contract authority. Two particular provisions allowed the supplier complete discretion to designate an authorized distributor: Section 16 prohibited Geary from

assigning its status as an All Brand distributor without All Brand's prior written consent; Section 11(A)(5) provided that All Brand could terminate Geary for cause if Geary attempted to sell its stock or assets to a third party. (R2-53-13, 14, 15).

6 Many jurisdictions addressing situations similar to this case have recognized that statutory alteration of such contractual rights can produce substantively detrimental consequences. In Jacobsen v. Anheuser-Busch, Inc., 392 N.W. 2d 888 (Minn. 1986), the Minnesota Supreme Court ruled that retroactive application of a beer distribution statute remarkably similar to Section 563.022 created an unconstitutional impairment of the beer supplier's contract right to withhold consent to a transfer of distribution rights. The Minnesota Supreme Court cited the statute's punitive damages and attorneys' fee award provisions as patent examples of the substantial impairment resulting from retroactive application of the statute:

> Absent Minn. Stat. ch. 3258 with its retroactivity provision, Anheuser-Busch's disapproval of the transfer of the wholesale agreement would have afforded no legal recourse to [the distributor or its proposed successor] ... Instead of being able to invoke a contract provision that was legal under the law at the time the contract was executed, the brewer now faces a trial based solely on claimed violations of the Minnesota Beer Brewers and Wholesalers Act with a measure of damages nonexistent

> under the prior contract law, plus possible exposure to punitive damages not available under prior contract law, plus an award of attorneys' fees normally not heretofore recoverable in this type of action. In our view this indeed constitutes a substantial impairment.

Jacobsen, 392 N.W.2d at 874 (citations omitted).

7 See S563.022(8), Fla. Stat. (1987) (shifting burden of proof to supplier).

8 The District Court's March 20th Order misinterpreted the Florida Supreme Court's decision in Park Benziger Co. The District Court dismissed Park Benziger Co. because it thought that the Florida Supreme Court had been unable to determine the true purpose of the statute under review. (R3-62-15). In fact, the Court in Park Benziger Co. hypothetically attributed the most substantial purpose possible to the statute and still found it insufficient to justify the resulting contract impairment retroactive application.

9 The reasoning of the Staff case is inapplicable to the instant case. Staff stands for the proposition that a non-prevailing party is entitled to notice and an opportunity for a hearing to contest a potential fee award assessed against it. The reasoning of Staff seeks to protect a non-prevailing party against liability for an uncontested fee award. See Staff, 518 So.2d at 982. Massey states that the trial court, after a hearing on attorneys' fees, failed to comply with

Rowe guidelines. See Massey, 508 So.2d at 742. A party's entitlement to a hearing was not an issue in Massey.

Respectfully submitted,

/S/_____
Richard M. Blau, Esq.
Florida Bar No. 347167
Stacy D. Blank, Esq.
Florida Bar No. 772781
HOLLAND & KNIGHT
Post Office Box 1288
Tampa, Florida 33601
(813) 227-8500
Attorneys for ALL BRAND IMPORTERS, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Appellant's Initial Brief and one copy of the Record Excerpt were furnished by U.S. Mail, first class postage prepaid, this day of January, 1990, to David H. Simmons, Esquire, Drage, de Beaubien, Knight & Simmons, 120 South Orange Avenue, P. O. Box 87, Orlando, Florida 32802.

APPENDIX 7

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
CASE NO.: 89-3593

GEARY DISTRIBUTING COMPANY, INC.

Plaintiff/Appellee,
Cross-Appellant,

vs.

ALL BRAND IMPORTERS, INC.

Defendant/Appellant,
Cross-appellee.

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

_____

BEFORE: FAY, JOHNSON and CLARK, Circuit Judges.

BY THE COURT:

Appellee-cross-appellant Geary Distributing Company, Inc.'s (Geary) motion to dismiss for lack of jurisdiction is Denied.

Appellee-Cross-appellant Geary's alternative motion to compel appellant-cross-appellee All Brand Importers, Inc. to supplement the record on appeal is

Denied.

Appellee-cross-appellant Geary's motion for enlargement of time to file answer/reply breif of Geary, construed as its reply-cross-appellee brief, is Granted to and including 30 days from the date of this order.

/s/

APPENDIX 8

GEARY DISTRIBUTING COMPANY, INC.,

Plaintiff-Appellee, Cross-Appellant,

v.

ALL BRAND IMPORTERS, INC.,

Defendant-Appellant, Cross-Appellee.

No. 89-3593.

United State Court of Appeals,
Eleventh Circuit.

May 22, 1991.

Distributor brought suit in state court alleging that wholesaler unreasonably withheld consent to assignment of distributorship. Wholesaler removed the case. The United States District court for the Middle District of Florida, No. 87-969 Civ-Orl-19, Robert R. Merhige, Jr., J., Visiting Judge, held that Florida's beer distribution statute could be retroactively applied to the contract and wholesaler, and distributor appealed. The Court of Appeals held

that retroactive application of the statute to an existing alcoholic beverage distribution contract would be found by the Supreme Court of Florida to result in impairment of contract significantly greater than necessary and would violate Florida Constitution's contract clause.

Vacated and remanded.

1. Federal Courts → 411

Correct interpretation of Florida Constitution's contract clause is question of Florida law, and federal courts are required to construe the Constitution as would the Supreme Court of Florida. West's F.S.A. Const. Art. 1, §10.

2. Federal Courts → 383

Where the Supreme Court of Florida has not addressed a particular issue, federal courts are then bound by decisions of Florida District Courts of Appeal that address the disputed issue,

unless there is indication that the Supreme Court would not adhere to district court's decision.

3. Assignments → 18

Florida law does not permit assignments of distributorship contracts unless the contract specifically provides for assignments.

4. Intoxicating Liquors → 6

Florida's authority for beer distributorship statute comes not from Twenty-First Amendment to the United States Constitution, but rather from Florida's inherent police power to regulate commercial activity within its borders. West's F.S.A. § 563.022; U.S.C.A. Const.Amend. 21.

5. Intoxicating Liquors → 111

The evil the Florida beer distributor statute seeks to eliminate is unfair business practices by franchisors that restrict distribution of malt beverage products to public.

West's F.S.A. § 563.022.

6. Constitution Law → 157

Intoxicating Liquors → 15

Retroactive application of Florida's beer distribution statute pertaining to a manufacturer's consent to assignment of distribution rights to an existing alcoholic beverage distribution contract would be found by Supreme Court of Florida to result in impairment of contract significantly greater than necessary and would violate Florida Constitution's contract clause. West's F.S.A. § 563.022; West's F.S.A. Const. Art. 1, § 10.

Appeals from the United States District Court for the Middle District of Florida.

Before KRAVITCH and COX, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

This appeal involves the

retroactive application of Florida's beer distribution statute, Fla.Stat. § 563.022, to an existing alcoholic beverage distribution contract between All Brand Importers, Inc. (All Brand) and Geary Distributing Company, Inc. (Geary). The district court held that the beer distribution statute could be retroactively applied to the contract between All Brand and Geary and that All Brand had violated the statute by unreasonably withholding its consent to a proposed assignment by Geary of its rights under the contract. The court awarded Geary compensatory damages, interest and attorneys' fees totalling $114,351.22. Both All Brand and Geary appeal.

I. FACTS AND PROCEDURAL HISTORY

All Brand is a New York corporation in the business of supplying alcoholic beverages at wholesale to distributors

in several states including Florida. Geary is a Florida corporation that did business as a distributor of alcoholic beverages in Orange, Volusia and Brevard Counties in Florida. In 1978, Geary and All Brand entered into an oral agreement that authorized Geary to distribute All Brand products, including Foster's Lager and Moosehead beer. The distribution agreement was in effect until 1987, when the present dispute arose. There was no written agreement evidencing the terms of the oral agreement. In 1984, All Brand signed a proposed written agreement, but Geary refused to sign. Both parties maintain that this written document reflects the content of their oral agreement, except for a provision concerning exclusivity of the distributorship. A copy of the 1984 document is attached as Appendix A to this opinion.

In 1985, Geary ceased it operations

in Orange County and sought to assign its distributorship rights for Orange County to Jim Taylor Corporation. Geary, pursuant to its oral agreement with All Brand, asked All Brand to consent to the assignment of distributorship rights. All Brand, after reviewing Taylor's qualifications, eventually consented to the assignment.

Later, Geary sought to assign its distributorship rights for Volusia County to Central Florida Distributors. Geary asked that All Brand consent to the assignment. All Brand, after reviewing Central Florida Distributors' qualifications, consented to this assignment also.

Then in September 1987, Geary requested All Brand's consent to Geary's assignment of the distribution rights for Brevard County to Grantham Distribution Company. According to the terms of an agreement between Geary and

Grantham, Geary would receive an additional $75,000.00 if Geary could ensure Grantham that it would be designated All Brand's distributor for Brevard County. All Brand refused to consent to the assignment to Grantham. All Brand maintains that it had a number of valid business reasons for refusing to consent to this assignment.

After All Brand refused to consent to the assignment to Grantham, Geary filed this action in the Circuit Court of Orange County, Florida. Geary alleges that All Brand unreasonably withheld consent to the assignment. Geary relies upon a recently enacted Florida statute, Fla.Stat.Ann. § 563.022 (West Supp. 1990)(the beer distribution statute), as the principal basis for its cause of action.[1] The beer

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[1] Geary also had other theories to support is cause of action. Because the district court did not address them, we do not address them.

distribution statute provides that a manufacturer may not unreasonably withhold consent to the assignment of distribution rights. See Fla.Stat.Ann. § 563.022(5)(b)(7) (West Supp. 1990).

All Brand removed the case to federal court and answered Geary's complaint by asserting that Florida's statute of frauds, Fla.Stat.Ann. § 725.01 (West 1988), precludes this cause of action and that retroactive application of the beer distribution statute would violate the Florida Constitution's contract clause,[2] and the United States Constitution's contract clause.[3] Geary maintains that

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[2] The Florida Constitution's contract clause provides, in pertinent part:

> No . . . law impairing the obligation of contract shall be passed.

Fla. Const. art. I, § 10.

[3] The United States Constitution's contract clause provides, in pertinent part:

the beer distribution statute supersedes the statute of frauds and controls this cause of action.

The district court agreed with Geary and held that the beer distribution statute supersedes the Florida statute of frauds and is the controlling statute in the case. In making that determination the district court concluded that the beer distribution statute could be applied retroactively without violating the United States Constitution's contract clause. The court, however, failed to explicitly address All Brand's contention that the retroactive application of the beer distribution statute would violate the Florida Constitution's contract clause.

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .
>
> U.S. Const. art. I, § 10, cl. 1.

After a bench trial, the district court found that All Brand had unreasonably withheld consent to the assignment. The court awarded Geary $75,000.00 in compensatory damages, $14,351.22 in interest, and $25,000.00 in attorneys' fees. No evidentiary hearing was held on Geary's request for attorneys' fees. Both parties appeal.

II. CONTENTIONS OF THE PARTIES ON APPEAL

All Brand contends that the district court erred by retroactively applying the beer distribution statute, Fla.Stat.Ann. § 563.022, to the contract at issue in this case. Geary contends that the district court erred by failing to conduct an evidentiary hearing to determine the amount of attorneys' fees to be awarded in this case.

III. DISCUSSION

The district court ruled that retroactive application of the beer

distribution statute does not violate the United State Constitution's contract clause. We need not address this question because we hold that retroactive application of the beer distribution statute violates the Florida Constitution's contract clause.[4]

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[4] Although the wording of both contract clauses is almost identical, the interpretation of the clauses has not been identical. The Supreme Court of Florida stated that "this Court, when construing a provision of the Florida Constitution, is not bound to accept as controlling the United States Supreme Court's interpretation of a parallel provision of the federal Constitution." Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774, 779 (Fla. 1979). In Pomponio, the Supreme Court of Florida adopted an approach to the Florida contract clause that the court termed "similar" to that of the United State Supreme Court's approach to the federal contract clause. Id. at 780. Although the approach is similar, Florida court interpreting the Florida contract clause appear to tolerate less impairment than

[1,2] The Florida Constitution provides that "[n]o . . . law impairing the obligation of contracts shall be passed." Fla. Const. art. I, § 10. The correct interpretation of this provision of the Florida Constitution is a question of Florida law. "Therefore, federal courts are required to construe the [Florida Constitution] ... as would the Supreme Court of Florida." Royal Health Care servs., Inc., v. Jefferson-Pilot Life Ins. Co., 924 F.2d 215, 216 (11th Cir. 1991). Where the Supreme Court of Florida has not addressed a particular issue, federal courts are then bound by the decisions of the Florida district courts of appeal that address the disputed issue, unless there is an indication that the supreme court would not adhere to the district court's decision. Maseda v. Honda Motor Co.,

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the federal courts interpreting the federal contract clause. See id.

861 F.2d 1248, 1257 n.14 (11th Cir. 1988); Rabon v. Automatic Fasteners, Inc., 672 F.2d 1231, 1235 n. 7 (5th Cir. Unit B 1982).[5]

We now turn to the substantive question at hand: whether the beer distribution statute can be applied retroactively to a contract entered into before the statute's enactment. The Supreme Court of Florida has not addressed the retroactivity of this particular statute, but an intermediate appellate court in Florida has. In Gans v. Miller Brewing Co., 560 So.2d 281 (Fla. 4th Dist. Ct. App. 1990), the Florida Fourth District Court of Appeal held that retroactive application of the beer distribution statute violates the Florida Constitution's contract clause.

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[5] In Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982), this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit.

In Gans, the Miller Brewing Company and Douglas Kerr had entered into a contract that authorized Kerr's company, the Huber Distributing Company, to distribute Miller's products. The contract provided that Kerr could not assign the distributorship rights without the written consent of Miller. Thereafter Kerr agreed to assign his distribution rights under the contract to Robert Gans. Miller refused to consent to the assignment and Kerr's distribution rights were not assigned to Gans. Gans, relying upon the beer distribution statute, Fla.Stat. § 563.022, sued Miller for unreasonably withholding consent to the assignment. The court held that the "suit would violate the Florida Constitution, Article I, § 10. The written contract in question predated the enactment of section 563.022 and said contract gave Miller the right to approve any sale of

the Huber distributorship." Gans, 560 So.2d at 283. Because Gans is a decision of a florida district court of appeal, we are bound by that decision unless there is an indication that the Supreme Court of Florida would decide the issue otherwise. Maseda, 861 F.2d at 1257 n. 14; Rabon, 672 F.2d at 1235 n. 7.

Any review of the Supreme Court of Florida's interpretation of the Florida Constitution's contract clause must begin with Yamaha Parts Distribs., Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975). In rejecting the contention that the legislature may retroactively lengthen the notice required to terminate a franchise agreement, the court noted that "[v]irtually no degree of contract impairment has been tolerated in this state." Id. at 559. The court stated that "the state's interest in policing franchise agreements and other

manifestations of the motor vehicle distribution system is not so great as to override the sanctity of contracts." Id.

The supreme court expanded upon Yamaha in Pomponio v. Claridge of Pompano Condominium, Inc. 378 So.2d 774 (Fla. 1979). The Pomponio court state that "our conclusion in Yamaha that 'virtually' no impairment is tolerable necessarily implies that some impairment is tolerable, although perhaps not so much as would be acceptable under traditional federal contract clause analysis." Id. at 780. The court went on to develop a balancing test similar to the one used in federal contract clause analysis. The court stated that "we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship

and the evil which it seeks to remedy." Id.

The beer distribution statute impairs this contract in several ways. The most significant contract impairment is that the statute imposes the restriction that All Brand cannot unreasonably withhold consent to an assignment of distributorship rights. The district court found that this restriction does not impair the contract because the common law of Florida prohibits All Brand from unreasonably withholding consent to the assignment.[6]

In concluding that the common law of Florida requires that consent to assignments not be unreasonably withheld

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[6] This court, like the district court, is unable to locate any reported cases establishing this as the common law of Florida. The only Florida case mentioning the issues explicitly stated that it was not deciding the question. See Troup v. Meyer, 116 So.2d 467 (Fla. 3rd Dist. Ct. App. 1959).

the district court relied on several landlord/tenant cases. Such cases are unpersuasive when dealing with franchise or distributorship contracts. There is a distinct difference in the relationship between a landlord and tenant and a franchisor and franchisee. A franchisor is markedly more concerned with a franchisee's qualifications, business conduct, and marketing techniques than is a landlord with a tenant's business.

[3] Florida law does not permit assignment of distributorship contracts unless the contract specifically provides for assignments. See Parker v. Evening News Pub. Co., 54 Fla. 544, 45 So.309 (1907); see also Clinton Foods, Inc., v. Frozen Foods, Inc., 130 F.Supp. 422 (S.D. Fla. 1955). Thus, because assignments in this area are not favored, we would be reluctant to conclude that consent to an assignment

could not be unreasonably withheld by a party to the contract.

The beer distribution statute also impairs the contract by requiring the reasonableness of the consent to be based on the qualifications of Florida distributors only rather than on national standards. See Fla.Stat.Ann. § 563.022(2)(j)(West Supp. 1990). The statute further impairs the contract by providing that the franchisor, not the franchisee, bears the burden of proving that consent was withheld reasonably. See id. at § 563.022(8). Finally, the statute impairs the contract by allowing the prevailing party in a cause of action under the statute to be awarded reasonable attorneys' fees. See id. at § 563.022(18)(c).

[4,5] Having concluded that the statute impairs the contract, we must now determine that state's authority for the statute and the evil the statute

seeks to remedy. The state's authority for the statute comes not from the Twenty-First Amendment to the United States Constitution,[7] as Geary contends, but rather from its inherent police power. The Twenty-First Amendment allows a state to circumvent only federal constitutional provisions, not state constitutional limitations. See California v. La Rue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972); Park Benziger & Co. v. Southern Wine & Spirits, Inc., 391 So.2d 681, 683 (Fla.

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[7] The Twenty-First Amendment to the United State Constitution provides, in pertinent part:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. amend. XXI, § 2.

1980); see also Bellanca v. New York State Liquor Autho., 54 N.Y. 2d 228, 429 N.E.2d 765, 445 N.Y.S.2d 87 (1981), cert. denied, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982); Heublein, Inc. v. Department of Alcoholic Beverage Control, 237 Va. 192, 376 S.E.2d 77 (1989). Thus, the state's authority for the statute is its inherent police power to regulate commercial activity within its borders. The evil the statute seeks to eliminate is unfair business practices by franchisors that restrict the distribution of malt beverage products to the public.

[6] In balancing the impairment of the contract against the authority for the statute and the evil it seeks to eradicate, we conclude that the Supreme Court of Florida would find the impairment is significantly greater than necessary. As stated by the supreme court in Yamaha, "the state's interest

in policing franchise agreements and other manifestations of the ... [malt beverage] distribution system is not so great as to override the sanctity of contracts." Yamaha, 316 So.2d at 559. Although the preservation of Florida's supply of malt beverages is an important goal, it is not enough to outweigh the impairment wrought by the statute. We conclude that there is no indication that the Supreme Court of Florida would decide the question differently. The Gans decision, therefore, controls this case.

IV. CONCLUSION

We conclude that the district court erred by ruling that the beer distribution statute could be retroactively applied to the contract at issue. We VACATE the district court's final judgment, including the award of attorneys' fees, and REMAND for proceedings consistent with this

opinion.[8]

VACATED and REMANDED.

APPENDIX A

DISTRIBUTOR AGREEMENT

AGREEMENT, dated as of March 15, 1984, by BRAND IMPORTERS, INC., ("ABI"), a New York corp principal place of business at 625 Madison Aven New York 10022, and GEARY DIST. CO., with a pla 420 Shearer Boulevard, Cocoa, Florida 32922 ("

WITNESSETH:

WHEREAS, ABI is the owner of authorized United States importer and distributor of the brands of malt beverages listed in Schedule A (the

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[8] In light of our holding that the beer distribution statute cannot be retroactively applied to the contract at issue, it necessarily follows that the award of attorneys' fees to Geary under the beer distribution statute must be vacated.

Geary's motion for attorneys' fees on appeal is denied.

"Products"); and

WHEREAS, DISTRIBUTOR is a duly licensed wholesaler of malt beverages in the State of Florida; and

WHEREAS, ABI desires to appoint DISTRIBUTOR as a distributor of the Products upon the terms and conditions hereinafter set forth; and

WHEREAS, DISTRIBUTOR desires to accept such appointment upon such terms and conditions;

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, it is agreed by the parties as follows:

1. Appointment.

ABI hereby appoints DISTRIBUTOR as a non-exclusive distributor of the Products listed in Schedule A, in the territory listed in Schedule B. DISTRIBUTOR may not appoint sub-distributors of the Products, except upon the prior written consent of ABI.

ABI reserves the right at any time on sixty (60) days prior written notice to DISTRIBUTOR to revise the territory and appoint direct distributors in some or all counties. ABI also reserves the right at any time in its sole discretion to allocate available supplies of the Products among its various customers, including DISTRIBUTOR.

2. Prices.

The prices of the Products to the DISTRIBUTOR shall be the prices established by ABI from time to time and in effect at the time of shipment. ABI reserves the right to change its prices at any time upon written notice to DISTRIBUTOR as permitted by law.

3. Orders.

All orders are subject to acceptance by ABI at the address first above written, or at such other addresses as may be designated by ABI from

time to time. Unless otherwise specified in writing by ABI all quantities of the Products ordered by DISTRIBUTOR hereunder for shipment on a direct import basis will be sold to DISTRIBUTOR F.O.B. Aqua Gulf Corporation's Bayonne, New Jersey warehouse, or such other plant or warehouse designated by ABI from time to time, with title and all risk of loss or damage passing to DISTRIBUTOR (1) in the case of direct import shipments, when the goods pass over the ship's rail at the foreign port of embarkation, or (2) in the case of all other shipments, when the goods are loaded aboard trucks or other carriers at the ABI plant or warehouse or other designated delivery point.

4. Payment Terms.

Payment for the Products shipped to DISTRIBUTOR hereunder shall be as established by ABI from time to time in

accordance with applicable law.

5. Distributor's Undertaking.

DISTRIBUTOR agrees at all times hereunder to use its best efforts diligently and vigorously to promote the sale of each of the Products, which effort shall, without limitation, include the following undertakings:

(a) To maintain a competent and trained sales force assigned to the Products sufficient in size to provide effective selling effort in substantially all retail outlets in all areas customarily serviced by DISTRIBUTOR;

(b) To exert at least as much selling effort on behalf of the Products as is exerted by DISTRIBUTOR on behalf of all other brands of malt beverage products sold by DISTRIBUTOR;

(c) To maintain sufficient inventories of the Products to fulfill all reasonably foreseeable requirements

therefor of retailers in the areas customarily serviced by DISTRIBUTOR;

(d) To maintain sufficient delivery vehicles in good operating condition, and sufficient delivery personnel, to ensure timely delivery of all retailer orders for the Products;

(e) To promote adequately the sale of the Products by means of lawful advertising and sales promotion activities; provided, however, that the DISTRIBUTOR agrees not to use any advertising or promotional material in connection with the sale of the Products until such material has been submitted to and approved in writing by ABI.

(f) To maintain in effect at all times during the term of this Agreement a wholesaler's beer license in accordance with the requirements of the Florida Beverage Law, as the same may be amended or superseded, from time to time.

The parties hereby acknowledge that failure by DISTRIBUTOR to fulfill each and every obligation of DISTRIBUTOR contained in this Paragraph 5 shall constitute just and sufficient cause for termination of this Agreement by ABI, with due regard for the equities of the parties under the law of the State of Florida.

6. Visits by ABI.

The DISTRIBUTOR shall permit officers and employees and designated representatives of ABI to visit and inspect the DISTRIBUTOR's facilities and, to the extent permitted by law, to accompany DISTRIBUTOR's personnel and representatives on sales and other calls relating to the distribution, advertising and promotion of the Products.

7. Relationship.

The relationship between the DISTRIBUTOR and ABI shall be that of an

independent buyer and seller. No employee or customer of the DISTRIBUTOR shall be deemed thereby to be an employee or customer of ABI nor shall the DISTRIBUTOR have any authority to make representations on behalf of ABI or to obligate it in any way to third parties.

8. Trademark Ownership and Use.

The DISTRIBUTOR shall sell and advertise the Products only under the trademarks regularly applied to the Products by ABI, or by ABI's suppliers. The DISTRIBUTOR shall not use any of such trademarks as part of any corporate name or of any trade name. Upon termination of this Agreement, the DISTRIBUTOR shall immediately cease all use of such trademarks or trade names except as may be required in connection with the sale of
any remaining inventory of the Products if ABI does not purchase such inventory

in accordance with the option given it under paragraph 14 of this Agreement.

DISTRIBUTOR acknowledges that it has not heretofore acquired, and will not acquire by reason of this Agreement or the distributorship created hereunder, any rights in or to any trademarks or trade names, registered or unregistered, owned or used by ABI or ABI's suppliers or used by others under authorization from ABI. If DISTRIBUTOR has acquired or at any time by any means hereafter acquires any rights in or to any such trademark or trade name, it will promptly, upon request, assign all such rights to ABI, or at ABI's request, to ABI's supplier. This provision shall survive the termination of this Agreement. DISTRIBUTOR will not at any time use or apply for registration of any such trademark or trade name.

DISTRIBUTOR agrees to notify ABI promptly of any use by others of trade

marks identifying Products represented by ABI, or of any other trademark covering any of the Products, which constitutes or could appear to constitute an infringement or passing off of any such trademark in the Territory. However, ABI shall have the sole right to decide whether or not legal proceedings or other action shall be brought or taken in connection with such use. If any such proceedings or other action are brought or taken, DISTRIBUTOR agrees to cooperate fully with ABI in the prosecution thereof. ABI shall assume all of the burden and be entitled to receive all of the benefits of any such proceeding or other action.

9. Reports by DISTRIBUTOR.

DISTRIBUTOR will periodically provide ABI with such reports as ABI may reasonably request, including, but not limited to monthly reports of

inventories, sales and depletions of the Products in the Territory. ABI shall have the right at any time and from time to time to conduct a physical inventory of the Products in DISTRIBUTOR's inventory.

10. Compliance with Law.

DISTRIBUTOR agrees at all times during the term of this Agreement to comply with all federal, state and local laws and regulations applicable to its performance hereunder.

11. Term.

This Agreement shall continue in effect until terminated as provided herein.

(A) Either party may terminate this Agreement forthwith upon the occurrence of any one or more of the following events:

(1) The appointment of a trustee, receiver or other similar custodian for all or any substantial part of the

other's property.

(2) The filing of a petition by the other, or any answer not denying jurisdiction, in a bankruptcy, under Chapter XI of the Federal Bankruptcy Act, or any similar law, state or federal, whether now or hereafter existing, or if any such petition is filed against the other and not vacated or stayed within fifteen (15) days of such filing.

(3) The making by the other of an assignment for the benefit of Creditors.

(4) The actual suspension or loss, by the other, of any federal or state license required for the operation of its business, whether lost through revocation, failure to renew or suspension, for a period of sixty (60) continuous days or more.

(5) The sale or transfer of substantially all of the physical assets, or a majority of the stock, or

ownership or control of the business of the other.

(6) The insolvency of the other.

(7) Breach of, or default under this Agreement by the other.

(8) Non-payment by the other when due of any monies due and payable under this Agreement.

(9) Any other event which constitutes good cause for termination of this Agreement under the laws or regulations of the State of Florida.

12. Orders Following Notice of Termination.

During the remaining term of this Agreement (if any) after the DISTRIBUTOR or ABI has given notice of termination, ABI shall not be obligated to sell to the DISTRIBUTOR a total quantity of any of the Products in any one month greater than the average monthly quantity of the Product shipped to the DISTRIBUTOR during the six months

immediately preceding the month in which the termination notice was given.

13. Return Authorization.

Merchandise returned for reasons of quality complaints are subject to examination by ABI. ABI will not honor such claims caused by events that originated after the Products passed from ABI's or ABI's supplier's control. ABI reserves the right to reject claims that do not comply with all applicable federal and state laws.

14. Effect of Termination.

A. Termination of this Agreement for any reason shall not affect any other rights or remedies, or any obligations which either party may have in connection with this Agreement at the time the termination becomes effective, whether such rights, remedies, or obligations are accrued, contingent, absolute, or otherwise at that time.

B. Upon termination of this

Agreement for any reason, ABI shall have the right and option, but not the obligation, to purchase from the DISTRIBUTOR any part or all of the marketable Products which the DISTRIBUTOR has on hand at the time the termination becomes effective. The purchase price for such Products shall be the net price paid therefor by DISTRIBUTOR and the actual cost to the DISTRIBUTOR of shipping them to its facilities in the Territory. In connection with any such purchase, ABI may direct the DISTRIBUTOR to ship, at ABI's expense, such Products to another destination designated by ABI.

15. Force Majeure.

ABI shall not be responsible for any liability, loss or damage to the DISTRIBUTOR due to any failure to ship or any delay in shipping accepted orders due to strikes, inability to obtain transportation, or any causes beyond

ABI's control, or by reason of ABI's having ceased to sell or distribute the Products involved, nor shall ABI be responsible for failure of delivery or delay due to federal, state or other governmental statute, regulation or authority.

16. Assignment.

This Agreement and the distributorship created thereunder are personal to DISTRIBUTOR and may not be assigned nor the obligations imposed by it delegated in whole or in part, in fact or by operation of law, without the prior written consent of ABI, provided, that ABI may assign this Agreement to any of its subsidiaries or affiliates, or to the successors or assigns of all or substantially all of its business.

17. Notices.

Any notice required or permitted to be given under this Agreement by one of the parties to the other shall be deemed

to have been sufficiently given for all purposes if mailed by registered or certified mail, postage prepaid, addressed to such party at the address first above written or such other address as the addressee shall have theretofore furnished in writing to the addressor.

18. Non-Waiver.

Failure by either party to exercise promptly any option or right herein granted to it or to require strict performance of any obligation herein imposed on the other shall not be deemed to be a waiver of such rights.

19. Scope of Agreement.

This Agreement constitutes the entire agreement between ABI and DISTRIBUTOR and supersedes all prior agreements and understandings. It may be modified only by an instrument in writing signed by both parties.

IN WITNESS WHEREOF, this Agreement

has been duly executed as of the date first above written.

ALL BRAND IMPORTERS, INC.

By: /s/ Joseph M. Tighe

Title: Vice President-National Sales

GEARY DIST. CO.

By:_____

Title:_____

SCHEDULE A TO DISTRIBUTOR AGREEMENT BY AND BETWEEN ALL BRAND IMPORTERS, INC. AND GEARY DIST. CO.

Carlsberg Lager

Carlsberg Elephant Malt Liquor

Foster's Lager

Mackeson Triple Stout

Moosehead

Noche buena

Pilsner Urquell

Whitbread Ale

Whitbread Kegs

SCHEDULE B TO DISTRIBUTOR AGREEMENT BY AND BETWEEN ALL BRAND IMPORTERS, INC. AND GEARY DIST. CO.

COUNTIE OF: Brevard.

APPENDIX 9

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
CASE NO.: 89-3593

FILED 11TH CIRCUIT JULY 26, 1991
MIGUEL J. CORTEZ, CLERK

GEARY DISTRIBUTING COMPANY, INC.

Plaintiff/Appellee,
Cross-Appellant,

vs.

ALL BRAND IMPORTERS, INC.

Defendant/Appellant,
Cross-appellee.

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

_____

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion May 22, 1991, 11th Cir., 19__, __F.2d__).

BEFORE: KRAVITCH and COX, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

(xx) The Petition(s) for Rehearing are DENIED and no member of th s panel nor other Judge in regular active service on

the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are Denied.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

APPENDIX 10

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
CASE NO.: 89-3593
D.C. DOCKET NO. 87-969 CIV-ORL 19

GEARY DISTRIBUTING COMPANY, INC.

Plaintiff/Appellee,
Cross-Appellant,

vs.

ALL BRAND IMPORTERS, INC.

Defendant/Appellant,
Cross-appellee.

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

_____

BEFORE: KRAVITCH and COX, Circuit Judges, and RONEY, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this

Court that the Judgment of the said District court in this cause be and the same is hereby VACATED; and that this cause by and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that the Plaintiff-Appellee, Cross-Appellant pay to defendant-appellant, cross appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: May 22, 1991

For the Court:
Miguel J. Cortez, Clerk

By: /s/
Deputy Clerk

ISSUED AS MANDATE: August 20, 1991

Supreme Court, U.S.
FILED
JAN 8 1992
OFFICE OF THE CLERK

(2)

No. 91-923

In The

Supreme Court of the United States

October Term, 1991

GEARY DISTRIBUTING COMPANY, INC.,

Petitioner,

v.

ALL BRAND IMPORTERS, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD M. BLAU
(Counsel of Record)
HOLLAND & KNIGHT
Post Office Box 1288
Tampa, Florida 33601
(813) 227-8500

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether the powers granted the states under the Twenty-First Amendment to the United States Constitution can be abrogated by a state constitutional provision.

II. Whether an appellate court has jurisdiction to determine an issue briefed by a party, but not raised by that party in its Notice of Appeal and Statement of Issue Presented on Appeal.*

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* Question II is misleading because it assumes facts directly contravened by the record. This Court should not accept the Petitioner's assertion that the issue in question was briefed at the appellate level without having been raised timely and properly.

NOTICE CONCERNING PARTIES TO THIS PROCEEDING

Pursuant to Rule 29.1 of the Supreme Court Rules, the Respondent notifies the Court that while this case was pending before the U.S. Court of Appeals for the Eleventh Circuit, All Brand Importers, Inc. was acquired from Heublein, Inc. by Guinness Import Company.

CORPORATE PARENT: Currently, All Brand Importers, Inc. is a wholly-owned subsidiary of Guinness Import Company, a Delaware corporation.

CORPORATE SUBSIDIARIES: Currently, All Brand Importers, Inc. owns one hundred percent (100%) of the issued stock of Mega Merchandising, Inc., a Delaware corporation, and forty-nine percent (49%) of the issued stock of All Brand Importers of Texas, Inc., a Texas corporation.

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No. 91-923

In The

Supreme Court of the United States

October Term, 1991

GEARY DISTRIBUTING COMPANY, INC.,

Petitioner,

v.

ALL BRAND IMPORTERS, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, All Brand Importers, Inc. respectfully prays that the Court deny Geary Distributing Company, Inc.'s petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

CITATIONS TO JUDGMENTS AND OPINIONS DELIVERED BELOW

The District Court's order of March 20, 1989, ruling that Florida's beer distribution law applied over Florida's statute of frauds to determine the merits of the case, is attached to the Petitioner's certiorari petition as Appendix 2.

The District Court's initial final judgment, dated June 21, 1989, is attached to the Petitioner's certiorari petition as Appendix 3.

The Eleventh Circuit's decision of May 22, 1991, reversing the District Court's ruling and vacating its initial final judgment has been published by West Publishing Company at 931 F.2d 1431 (11th Cir. 1991).

The District Court, complying with the Eleventh Circuit's order and mandate, convened a new trial of this case on November 11, 1991. The District Court filed a new final judgment and accompanying memorandum on December 11, 1991; copies of that judgment and memorandum are attached to this response as composite Appendix "1."

STATEMENT OF THE CASE

At all times pertinent to this action, All Brand Importers, Inc. ("All Brand") was a New York corporation authorized to do business in Florida as a supplier of alcoholic beverages. (R2-52-2) (App.-2).[1] At all times pertinent to this action, Geary Distributing Company, Inc. ("Geary") was a Florida corporation that distributed alcoholic beverages at the wholesale level between suppliers and retailers. (R2-52-2) (App.-2).

THE PARTIES' ORAL CONTRACT

From 1978 through 1987, Geary was authorized by All Brand to commercially distribute certain imported beers (e.g., *Moose Head Beer*) in certain Florida geographical markets (e.g., Orange County, Volusia County and Brevard County). (R2-52-2) (App.-2). Geary and All Brand conducted business pursuant to an oral agreement, and never executed a binding, written contract. (App.-2,3). On or around March 15, 1984, a written agreement memorializing the terms of the parties' oral contract (the "Memorial") was prepared and executed by All Brand, and

---

[1] Citations made to the record on appeal to the Eleventh Circuit will be identified as ("R___-___-___"), reflecting the volume number, docket number and page number of each reference. Citations to transcripts of the 1989 trial will be identified as ("R___-___") and will include the volume number assigned by the Eleventh Circuit, as well as the page number. Citations to the District Court's findings following its post-appeal retrial of the case will be identified as ("App-___") and will reference Appendix 1 of this response, which contains copies of the District Court's final judgment and accompanying memorandum dated December 11, 1991.

submitted to Geary for execution. (App.-2). Geary, however, refused to sign the Memorial due to a dispute over a provision concerning the distributorship's exclusivity. (R2-53-10, *et seq.*) (App.-2). Aside from the issue of exclusivity, the parties acknowledge that the Memorial accurately reflected the terms of the oral contract that defined their business relationship. (R2-47-13) (App.-2).

Two provisions of the parties' business relationship are especially pertinent to this case. Section 16 of the Memorial reflects that the distribution rights granted by All Brand to Geary were personal to the distributor, and could not be assigned or transferred by Geary to any third party without All Brand's prior written consent. (App.-6). Also, Section 11(A)(5) of the Memorial shows that All Brand had the contractual right to terminate Geary "forthwith" if the distributor sold or transferred substantially all of its physical assets, ownership or control. (App.-6,7).

In February of 1985, Geary's business had declined to the point that All Brand would not ship any product to the distributor without prepayment or a letter of credit. (App.-3). By 1987, Geary was operating at a point of marginal profitability at best. (R2-52-2) (App.-3).

FLORIDA'S NEW BEER LAW

In the Summer of 1987, the Florida Legislature adopted a new beer distribution law. Codified as Section 563.022 of the Florida Statutes, the beer law gave distributors significantly expanded powers and new rights in their dealings with beer suppliers. For example, Subsection 7 of the new law guaranteed to beer distributors

certain powers allowing them to sell or assign their distributorship rights to third parties. Similarly, Subsection 18 of the new law created new causes of action for distributors, and granted them previously non-existent entitlements to attorneys' fees and punitive damages.

Section 563.022 took effect in June of 1987. Subsection 15 of the new law expressly provided that the statute applied to all beer distribution business relationships – even those already established by pre-existing contracts.

THE SALE OF GEARY'S BUSINESS

In September of 1987, Geary's owner and chief executive officer, William Geary, announced to All Brand that he had agreed to sell his business *in toto* to Grantham Distributing Company ("Grantham"). (R2-52-2) (App.-3). Contract documents drafted and executed by Geary and Grantham, without All Brand's knowledge or participation, set the purchase price and terms of the sale. (R5-58,59) (App.-3). According to the proposed Geary-Grantham transaction, William Geary would be paid an additional $75,000.00 if he could insure that Grantham would be designated as All Brand's authorized distributor for the Brevard County market. (R2-49-3) (App.-3).

By letter dated September 11, 1987, William Geary asked All Brand to evaluate and accept Grantham as the supplier's authorized distributor for the Brevard County market. (R5-62) (App.-3,4). Pursuant to William Geary's request, All Brand reviewed Geary's proposed successor in accordance with the supplier's established evaluation criteria and procedures. (R2-52-3) (R5-91) (App.-4). Based on its review, All Brand determined that Grantham

was not suitably qualified to serve as the supplier's authorized distributor in Brevard County for a variety of business reasons. (R2-52-3); (R5-91); (App.-4). By the end of October, 1987, Geary was informed of All Brand's rejection of Grantham. (App.-4).

Prior thereto, however, on September 25, 1987, Geary published a Notice of Bulk Transfer in a Brevard County newspaper, advising that the distributor was transferring substantially all of its assets to Grantham. (App.-5). Moreover, on October 12, 1987, Geary consummated the sale of substantially all of the company's assets and distribution rights to Grantham. (App.-5).

Upon being notified of All Brand's refusal to designate Grantham as its authorized distributor, Geary instituted this action against the supplier. (R2-52-3); (App.-5). Geary sued All Brand for breach of contract and asserted that the recently-adopted beer distribution law, Section 563.022 of the Florida Statutes, obligated All Brand to accept Geary's choice of Grantham to serve as All Brand's authorized distributor for the Brevard County market. (R3-62-2,3).

COURSE OF PROCEEDINGS

Geary filed its complaint in the Orange County Circuit Court on October 27, 1987. (R1-1-5, *et seq.*). All Brand petitioned to remove this action to the U.S. District Court for the Middle District of Florida, Orlando Division, on October 31, 1987, based on diversity jurisdiction. (R1-1-1). Removal of the case was acknowledge by the District Court on November 2, 1987. (R1-3-1).

Beginning on January 27, 1988, the parties launched a series of competing motions for summary judgment. (R2-25-1); (R2-29-1); (R2-47-1); (R2-49-1); (R3-65-1). All

Brand argued for summary judgment based on Florida's statute of frauds, Section 725.01 of the Florida Statutes; Geary sought summary judgment based on the newly-adopted beer distribution law, Section 563.022 of the Florida Statutes. (R2-47-3).

The District Court granted partial summary judgment to Geary in its order of March 20, 1989, wherein U.S. District Judge Patricia Fawcett ruled that Section 563.022 superceded Section 725.01 and applied to this action. (R3-62-7). The District Court's March 20th order went on to find that several material issues of fact remained, requiring the case to proceed to trial. (R3-62-16).

Subsequently, a non-jury trial was held on June 19, 1989, before U.S. District Judge Robert Merhige, Jr., sitting by designation. (R3-82-1). Judge Merhige began the trial by acknowledging that the law of the case would comport with the March 20, 1989 Order issued by Judge Fawcett concerning the applicability of Section 563.022 over Section 725.01. (R5-21).

On June 21, 1989, a final judgment was entered by Judge Merhige in favor of Geary and against All Brand. (R3-85-1). Applying Section 563.022, the final judgment awarded Geary $75,000.00 in compensatory damages, no punitive damages, pre-judgment interest in the amount of $14,351.22 and attorney's fees in the amount of $25,000.00, for a total sum of $114,351.22. (R3-85-1).

All Brand filed a timely Notice of Appeal on July 21, 1989. (R3-86-1). Geary filed its notice of Cross-Appeal on August 2, 1989. (R3-87-1).

On February 8, 1990, Geary moved to dismiss All Brand's appeal on jurisdictional grounds. Geary's motion

asserted that All Brand's Notice of Appeal and Statement of the Issue Presented on Appeal failed to preserve the constitutional issue addressed in the supplier's appellate brief. After reviewing legal memoranda on the jurisdictional issue, the Eleventh Circuit denied Geary's dismissal motion by order dated July 23, 1990.

By decision filed on May 22, 1991, the U.S. Court of Appeals for the Eleventh Circuit reversed the District Court's determination that Section 563.022 governed the parties' distribution agreement. The appellate court ruled that retroactive application of Section 563.022 violated the Contracts Clause of the Florida Constitution (Fla. Const. art. I, § 10) by unduly impairing All Brand's rights under the parties' preexisting distribution agreement. Because it ruled on state law grounds, the Eleventh Circuit did not address whether retroactive application of the new beer statute violated the Contracts Clause of the Federal Constitution (U.S. Const. art. I, § 10, cl. 1). The Eleventh Circuit's decision vacated the District Court's final judgment and remanded the case for further proceedings consistent with the appellate court's ruling.

Geary initially petitioned this Court for a writ of certiorari through its filing dated October 24, 1991. Due to procedural infirmities, the Clerk of this Court refused to file Geary's initial submission, and returned it for correction. Geary refiled a corrected certiorari petition, which counsel for All Brand received via U.S. Mail on December 9, 1991.[2]

---

[2] Counsel for the Petitioner has failed to properly notify the Respondent of the date on which it filed its corrected

(Continued on following page)

Because Geary declined to request a stay of the Eleventh Circuit's mandate during this Court's consideration of the pending petition, the District Court convened a new trial of this case on November 11, 1991. On December 11, 1991, U.S. District Judge Robert Merhige filed a memorandum and entered a final judgment adjudicating all claims in favor of All Brand.

SUMMARY OF ARGUMENTS

Geary's certiorari petition raises one substantive argument involving the Twenty-First Amendment to the U.S. Constitution, and one jurisdictional argument based upon Rules 3(a) and 10(b)(3) of the Federal Rules of Appellate Procedure. Both arguments lack merit.

I. The Twenty-First Amendment

Geary's substantive argument confuses the purpose and function of the Twenty-First Amendment. As this Court has noted on several occasions, the Twenty-First Amendment is a check on the *federal* government's authority to impede state control of the alcoholic beverage industry.

(Continued from previous page)

petition, as required by Rule 12.1. Instead, counsel for the Respondent received an authorized notice form on December 30, 1991 reflecting a filing date of October 24, 1991 – the date when Geary unsuccessfully attempted to file its first, unacceptable petition.

The petition before this Court, however, does not involve federal restraint of state alcohol laws.

The Eleventh Circuit reversed the District Court because retroactive application of the Florida beer law at issue in this case impaired All Brand's pre-existing contract rights in violation of the Contracts Clause of the *Florida* Constitution. Geary's petition might have raised a colorable argument had the Eleventh Circuit based its ruling on the Contracts Clause of the Federal Constitution. The Eleventh Circuit avoided that situation, however, by deciding the case on the narrower state law grounds.

Nor do any of the considerations identified in Rule 10 of the Supreme Court Rules justify Geary's petition. The Eleventh Circuit correctly recognized that Florida rigidly enforces the prohibition against impairment of contracts set forth in its own constitution. The Eleventh Circuit's ruling comports with Florida precedents establishing that the types of contracts at issue in this case (*i.e.* contracts involving the distribution of alcoholic beverages) cannot be impaired by the Florida Legislature in disregard of the Florida Constitution's Contracts Clause. *See, e.g. Park Benziger and Co. v. Southern Wine & Spirits, Inc.*, 391 So. 2d 681, 683 (Fla. 1980); *Gans v. Miller Brewing Co.*, 560 So. 2d 281, 283 (Fla. 4th DCA 1990). There is no substantive basis for disturbing the Eleventh Circuit's decision in this case.

II. Notice of Appeal

As for Geary's jurisdictional argument, it is rebutted by the record. Geary presents its question in such a way as to assume that the issues briefed during the appellate

proceedings in this case were not properly raised before the Eleventh Circuit. Geary's argument lacks merit because its fundamental assumption is false.

There was no violation of Rules 3 or 4 of the Federal Rules of Appellate Procedure because All Brand's Notice of Appeal was timely filed. Moreover, both All Brand's Notice of Appeal, dated July 21, 1989, and its Statement of Issue Presented on Appeal, dated August 3, 1989, properly preserved the District Court's ruling on the applicability of Florida's beer distribution law as the subject of appeal.

In fact, Geary's jurisdictional argument was already raised previously, and rejected. Following the filing of All Brand's initial brief, Geary sought the dismissal of All Brand's appeal by the Eleventh Circuit arguing that the initial brief raised a new constitutional issue not preserved properly by earlier filings. The appellate court reviewed legal memoranda from the parties on the very issue that is now before this Court, and denied Geary's dismissal motion. A copy of the Eleventh Circuit's ruling on this jurisdictional issue was attached to Geary's certiorari petition as Appendix 7.

Neither of the questions presented by Geary justify disturbing the Eleventh Circuit's action in this case. Nor are there any Rule 10 considerations justifying Geary's petition; the Eleventh Circuit's opinion applies state law, not federal law, and is completely consistent with Florida precedents.

Accordingly, Geary's petition for certiorari should be DENIED.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit correctly held that the Contracts Clause of the Florida Constitution prohibited retroactive application of Florida's beer distribution statute to the parties' pre-existing agreement

Throughout the parties' litigation, Geary has attempted to focus attention on the Contracts Clause of the U.S. Constitution, rather than the Florida Constitution. By focusing on federal law, Geary hoped to argue that any impairment of All Brand's preexisting contract rights by Florida's beer distribution law was permissible because the Twenty-First Amendment to the U.S. Constitution gives Florida broad powers to regulate the alcoholic beverage industry. Geary's argument is misguided because the Twenty-First Amendment is irrelevant to this case.

The Twenty-First Amendment to the U.S. Constitution was designed to end the "noble experiment" by which the federal government tried to control the drinking habits of all citizens. Section 1 of the Twenty-First Amendment repealed the Eighteenth Amendment and effectively conceded that the goal of Prohibition could not be attained at the federal level. Section 2 of the Twenty-First Amendment gave the states broad authority to deal with the subject of intoxicating liquor free from many of the limitations imposed by the Commerce Clause, which had hampered state liquor regulation prior to adoption of the Eighteenth Amendment.

Because it involves a grant of authority from the federal government to the states, the Twenty-First Amendment is relevant only when a state alcoholic beverage law is challenged as a violation of federal law. The

cases cited in Geary's petition, for example, pit the state's authority to regulate alcoholic beverages under the Twenty-First Amendment against the individual's rights to attend "nude dance bars" under the First Amendment to the U.S. Constitution. *E.g., City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 93 L. Ed. 2d 334 (1986); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 69 L. Ed. 2d 357 (1981); *Fillingim v. Boone*, 835 F.2d 1389 (11th Cir. 1988).

In this case, however, All Brand argued, and the Eleventh Circuit agreed, that retroactive application of Section 563.022 violated the Contracts Clause of the Florida Constitution. Where a state statute is challenged as a violation of the state's *own constitution*, the Twenty-First Amendment has no relevance whatsoever. *See Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 917-18 n.4 (1st Cir. 1988) (rights protected by state constitution need not address preferred position afforded to alcoholic beverage laws by Twenty-First Amendment). As one state supreme court has aptly summarized: "The [United States] Supreme Court has *never* espoused the proposition that the Twenty-First Amendment of the Federal Constitution confers a power on the States which is superior to or free from the constraints of their *own constitutions*." *Bellanca v. New York State Liquor Authority*, 54 N.Y. 2d 228, 236, 429 N.E. 2d 765, 769, 445 N.Y.S. 2d 87, 91 (1981), *cert. denied*, 456 U.S. 1006, 73 L. Ed. 2d 1300 (1982) (emphasis added); *accord Heublein, Inc. v. Department of Alcoholic Beverage Control*, 376 S.E. 2d 77, 78-79 (Va. 1989) (Twenty-First Amendment is not relevant when statute is challenged under a state constitution's prohibition against contract impairment); *see also California v. LaRue*, 409 U.S.

109, 115, 34 L. Ed. 2d 342, 350 (1972) (power of the Twenty-First Amendment is exercised in the context of "other provisions of the United States Constitution").

In this case, the retroactive application of Section 563.022 was not challenged on First Amendment grounds. The Eleventh Circuit's decision in this case was founded expressly upon the beer law's contravention of the Contracts Clause contained in Florida's Constitution. *Geary Distributing Company, Inc. v. All Brand Importers, Inc.*, 931 F.2d 1431, 1434 (11th Cir. 1991). In footnote 4 of the Eleventh Circuit's decision, the appellate court recognized that "Florida courts interpreting the Florida Contract Clause appear to tolerate less impairment than the federal courts interpreting the Federal Contract Clause." *Id.* at n.4, *citing Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774, 780 (Fla. 1979).

The Eleventh Circuit's decision is supported by Florida case law. In case after case, the Florida Supreme Court has made it clear that "virtually no degree of contract impairment has been tolerated in this State." *Yamaha Parts Distributors, Inc. v. Ehrman*, 316 So.2d 557, 559 (Fla. 1975); *accord e.g., Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So.2d 681, 683 (Fla. 1980). Thus, "[a]ny legislative action which diminishes the value of a contract is repugnant to and inhibited by the constitution." *In re: Advisory Opinion*, 509 So.2d 292, 314 (Fla. 1987); *see State Department of Transportation v. Edward M. Chadbourne, Inc.*, 382 So.2d 293, 297 (Fla. 1980) (any statute "which attempt[s] to affect existing contracts flies into the wall of absolute prohibition"); *Lee County Bank v. Christian Mutual Foundation, Inc.*, 403 So.2d 446, 448-49 (Fla. 2d

DCA 1981) ("in practice" the Florida Supreme Court has "prohibited any form of contract impairment").[3]

Florida's rigid enforcement of its constitutional prohibition against the impairment of contracts dictates the outcome of this case. Although the Twenty-First Amendment returns to each state the power to regulate alcoholic beverages within that state's boundaries, the amendment does not allow state authorities to violate their own state constitutions. *See, e.g., Mickens v. City of Kodiak*, 640 P.2d 818, 821 (Alaska 1982); *Commonwealth v. Sees*, 373 N.E. 2d 1151, 1155 (Mass. 1978); *Sekne v. City of Portland*, 726 P.2d 959, 963-64 (Or. App. 1986); *cf. Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81, 64 L. Ed. 2d 741, 752 (1980) (states may adopt a constitutional provision that provides more protection than its federal equivalent). Geary has cited no authority to rebut this point.

Had the Eleventh Circuit based its decision on the Federal Contracts Clause, Geary *might* have had a colorable basis to support its petition. The Eleventh Circuit, however, based its decision upon the rigidly-enforced Contracts Clause of the Florida Constitution. In this context, Geary has no basis upon which to invoke the powers of the Twenty-First Amendment.

Accordingly, for the reasons set forth above, this Court should deny Geary's petition for a writ of certiorari.

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[3] *See also, Dewberry v. Auto-Owners Insurance Company*, 363 So.2d 1077, 1080 (Fla. 1978) ("[i]t is axiomatic that subsequent legislation which diminishes the value of a contract is repugnant to our Constitution"); *Hardware Mutual Casualty Co. v. Carlton*, 9 So.2d 359 (Fla. 1942) ("[t]he obligation of a contract is impaired when the substantive rights of the parties thereunder are changed").

II. All Brand's appeal was properly brought before the Eleventh Circuit

All Brand properly appealed the District Court's final judgment, which applied Section 563.022 of the Florida Statutes to adjudicate the merits of this action. Pursuant to Rule 3(a) of the Federal Rules of Appellate Procedure, All Brand filed its Notice of Appeal in a timely fashion. Geary has failed to identify any flaw in All Brand's Notice of Appeal.

Similarly, in accordance with Rule 10(b)(3), All Brand filed its Statement of the Issue Presented on Appeal. In its petition, Geary's argument quoted only a portion of All Brand's Statement of the Issue Presented on Appeal. *See* Geary's Petition at 4-5. What Geary's argument failed to acknowledge is that the remainder of All Brand's statement expressly referenced the District Court's ruling that Section 563.022 could be applied retroactively to govern the adjudication of this action. *See* Geary's Petition at Appendix 4.

All Brand's appeal comported with the Federal Rules of Appellate Procedure, as well as the rules of the Eleventh Circuit. No reasonable review of the appellate materials filed by All Brand can sustain Geary's claim that All Brand waived the appellate court's jurisdiction over the issue set forth in All Brand's initial/answer brief of January 8, 1990. *See Foman v. Davis*, 371 U.S. 178, 181-82, 9 L. Ed. 2d 222, 225-26 (1962) (liberal construction afforded to appellate rules); *Matute v. Procoast Navigation, Ltd.*, 928 F.2d 627, 629-30 (3d Cir. 1991) (liberal construction afforded to notices of appeal); *C. A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir. 1981)

cert. denied 454 U.S. 1125, 71 L. Ed. 2d 112 (1981) (where claims or issues are intertwined, each claim may be reviewed on appeal even though all are not referred to in the notice of appeal). In this case, the District Court's constitutional analysis of Section 563.022 was intertwined with its decision to apply that law over Florida's statute of frauds.

Moreover, this Court should note that Geary raised this same argument with the Eleventh Circuit, when it filed a motion to dismiss with an alternative motion for extension of time. Both parties submitted briefs on the very jurisdictional issue now raised by Geary. The Eleventh Circuit denied Geary's motion to dismiss, but granted Geary additional time to respond with its answer/reply brief. It is evident from the record before this Court that Geary was not prejudiced in any way by All Brand's formulation of the issues on appeal. *See C. A. May Marine Supply Co., supra* at 1056 (likelihood of prejudice assessed in determining validity of appeal).

Finally, the plain language of Rule 3(a) clearly states that:

> Failure of an appellant to take any step *other than the timely filing of a notice of appeal* does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. (Emphasis added.)

All Brand's Notice of Appeal was timely filed, so jurisdiction is not the issue here. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316, 101 L. Ed. 2d 285, 291 (1988), *citing Foman v. Davis, supra* (confirming the "liberal construction" rule governing appellate procedure matters). What

Geary's petition really challenges is the Eleventh Circuit's exercise of its discretion. The Eleventh Circuit evaluated Geary's jurisdictional argument, and denied it. Geary has offered nothing to show an abuse of the appellate court's Rule 3 discretion.

Accordingly, for the reasons set forth above, Geary's Petition for Writ of Certiorari should be DENIED.

CONCLUSION

Geary has neither the substantive nor jurisdictional grounds upon which to receive a writ of certiorari from this Court. Nor has the Petitioner cited a Rule 10 basis to justify disturbing the Eleventh Circuit's decision.

Accordingly, Geary's petition for certiorari should be DENIED.

Respectfully submitted,

RICHARD M. BLAU
(Counsel of Record)
HOLLAND & KNIGHT
Post Office Box 1288
Tampa, Florida 33601
(813) 227-8500

Attorneys for All Brand Importers, Inc.

APPENDIX

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

GEARY DISTRIBUTING COMPANY, INC.

V.

ALL BRAND IMPORTERS, INC.

JUDGMENT IN A CIVIL CASE

(Filed Dec. 12, 1991)

CASE NUMBER: 87-969-CIV-ORL-19

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff recover nothing of the defendant and that judgment is entered in favor of the defendant All Brand Importers, Inc., who stands dismissed with its costs.

December 11, 1991
Date

/s/ David L. Edwards
Clerk

M'FILM ROLL #76
DOCUMENT #1126

/s/ Cindy J. Burgess
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

GEARY DISTRIBUTING COMPANY, INC., Plaintiff,	)	Case No. 87-969-ORL-CIV-19
v.	)	
ALL BRAND IMPORTERS, INC., Defendant.	)	

MEMORANDUM

(Filed Dec. 11, 1991)

After having heard the evidence, the Court makes the following findings of fact and conclusions of law.

The Plaintiff, Geary Distributing Company, Inc. (Geary), is a Florida-based distributor, and the Defendant, All Brand Importers, Inc. (All Brand), is a New York corporation doing business in the State of Florida. The amount involved exceeds the sum of $50,000 exclusive of interest and costs, and jurisdiction is attained by virtue of diversity of citizenship. 28 U.S.C. § 1332.

The Court finds from the evidence that the Plaintiff entered into an agreement with All Brand in 1978 whereby Geary was granted the right by All Brand to distribute beer imported by All Brand in Orange, Volusia, and Brevard Counties, all in the State of Florida. Their agreement was an oral one until about March 15, 1984, when a written agreement evidencing the terms of the then existing oral contract was executed by All Brand. Geary refused to execute the agreement because of its

disagreement with one of its terms. Nevertheless, the business relationship continued by virtue of an oral understanding until 1987, when the instant dispute arose.

In 1985, Geary ceased its operations in Orange County and assigned its distribution rights for that market to Jim Taylor Corporation. Prior to doing so, Geary sought and received the consent of All Brand. At the time, All Brand approved Jim Taylor to become a nonexclusive, authorized distributor for its products in Orange County, Florida. Subsequent thereto, Geary sought to assign its distributorship rights for Volusia County to Central Florida Distributors and, as it had with the Jim Taylor assignment, sought and received All Brand's consent.

It should be noted that sometime in 1985, Geary's business had declined to the point that All Brand would not ship any product to it without prepayment or a letter of credit. These requirements were met.

Sometime in 1987, Geary was operating at a point of marginal profitability and, indeed, between March and October of that year, Geary had made no effort to purchase any products from All Brand. In September of 1987, Geary negotiated the sale of its assets and operations to Grantham Distributing Company, Inc. (Grantham) without the knowledge or participation of All Brand. The agreement between Grantham and Geary called for payment of an additional $75,000 upon Grantham being designated All Brand's distributor for Brevard County. At the conclusion of the negotiation of the terms of Geary's sale to Grantham, William Geary, President of Geary, by letter of September 11, 1987, advised All Brand of the

Grantham transaction and requested its cooperation. This communication was followed by a number of telephonic efforts in which Geary sought prompt approval of Grantham as its authorized successor. The evidence reflects that Mr. Geary was informed that All Brand would have to review the situation according to its established evaluation procedures before it would designate Grantham as a new distributor. The record also reflects that one gentlemen of All Brand was instructed by his superior to evaluate Grantham as a proposed distributor for the Brevard County market and to expedite the process wherever possible.

A review pursuant to All Brand's established evaluation criteria procedures was made, including conversations with Geary and the principal of Grantham. At no time was either Geary or Grantham given written approval of their proposed transaction. Indeed, All Brand concluded that Grantham was not the best choice to serve as its distributor for the Brevard market in part because Grantham lacked a distribution warehouse facility in Brevard County, and Grantham's perceived limited involvement in beer distribution. The evidence reflects that Grantham's primary distribution dealt with wine and other alcoholic beverages excluding beer, which represented twenty-five percent of Grantham's distribution.

In short, All Brand concluded Grantham was not suitably qualified according to its criteria, and by the end of October, 1987, Geary was informed of All Brand's rejection of Grantham as an authorized distributor of its product lines for the Brevard County market.

Prior thereto, however, on September 25, 1987, Geary published a Notice of Bulk Transfer in the Brevard County newspaper, advising that Geary was transferring substantially all of its assets to Grantham. And, on October 12, 1987, Geary sold substantially all of the assets and distribution rights belonging to the company to Grantham. Upon being notified by All Brand of its refusal to consent to the assignment to Grantham, Geary brought this suit seeking both monetary and injunctive relief.

At about the time of its filing of suit, Geary, for the first time since March of 1987, sent All Brand a purchase order for a total of 1,430 cases of beer. This order was referenced in a letter to All Brand from William Geary dated October 29, 1987. His order, however, contra to credit policies in effect with All Brand, did not include cash or check payments, and his purchase order was returned unfilled. This was followed by a letter from All Brand to Geary stating that it was not filling his request because (1) he was no longer in business having apparently sold out to Grantham; (2) that his purchase order had provided All Brand with insufficient lead time to fill the order; (3) that he had not placed any other orders with All Brand since March 17, 1987; and (4) the purchase order lacked an irrevocable standby letter of credit or certified check.

It is to be noted that the letter, dated November 4, did not specifically terminate Geary as a distributor to All Brand and, indeed, concluded with the phrase "We await your response." No response was forthcoming except a communication from counsel alleging a breach on the part of All Brand. Efforts were made by All Brand to contact Mr. Geary, even to the point of having one of its

employees dispatched to the Geary warehouse facility, only to find that the warehouse was closed.

All Brand thereafter determined that Jim Taylor was the appropriate distributor in Brevard County and was most qualified to serve as its authorized distributor for that market. The evidence fully reflects a fair and reasonable business basis for that decision.

Regardless of whether or not § 25.01 Fla. Stat. (*see also All Brand Importers, Inc. v. Tampa Crown Distributors, Inc.*, 864 F.2d 748, 749 (11th Cir. 1989)) applies, Geary's claims are governed by the expressed provisions of the 1984 written agreement signed by All Brand. Although Geary had not signed it, the parties operated under that written document for some years. Section 16 of the agreement expressly provides that the business relationship between All Brand and Geary was personal to Geary. Neither the distributorship nor the obligations imposed by it could be assigned or delegated without the prior written consent of All Brand and Geary breached this aspect.

Geary's contention that All Brand's prior consent to distributorship assignments constitute a waiver of the supplier's rights under Section 16 of the written memorialization of their agreement is inaccurate. That same agreement provides that failure to require strict performance in one instance would not be deemed to waiver as to future instances. *See Kent v. Tallahassee Motor Co.*, 193 So. 821, 822 (Fla. 1940).

The Court finds that the agreement between Geary and Grantham was at all material times contingent upon Grantham receiving written approval as a distributor from All Brand. Finally, despite All Brand having

approved prior assignments, such were premised on All Brand's criteria and Grantham, who was not primarily a distributor of beer, simply did not meet All Brand's criteria. Geary's arrangement with All Brand did not constitute a license to force his choice of distribution on All Brand absent conduct by it which would constitute a waiver of its rights under the document under which the parties had operated – this simply did not happen.

There was no wrongful termination by All Brand as contended by Geary since the memorialization provided that the business relationship between the parties could be terminated by either party "forthwith" in the event that the other parties sold or transferred substantially all the physical assets, ownership or control of its business, and this Geary did.

The agreement specifically precluded Geary from assigning its rights to distribute All Brand's products without the prior written consent, and his doing so violated the contract between the parties.

An Order finding for the Defendant will issue.

/s7 Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date 12/11/91

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

GEARY DISTRIBUTING COMPANY, INC., Plaintiff,	)	Case No. 87-969-ORL-CIV-19
v.	)	
ALL BRAND IMPORTERS, INC., Defendant.	)	

ORDER

(Filed Dec. 11, 1991)

For the reasons stated in the Memorandum of the Court this day filed and deeming it proper so to do, it is ADJUDGED AND ORDERED that the Plaintiff recover nothing of the Defendant and that judgment be entered in favor of the Defendant All Brand Importers, Inc., who stands DISMISSED WITH ITS COSTS.

Let the Clerk send copies of the Memorandum and this Order to all counsel of record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date 12/11/91